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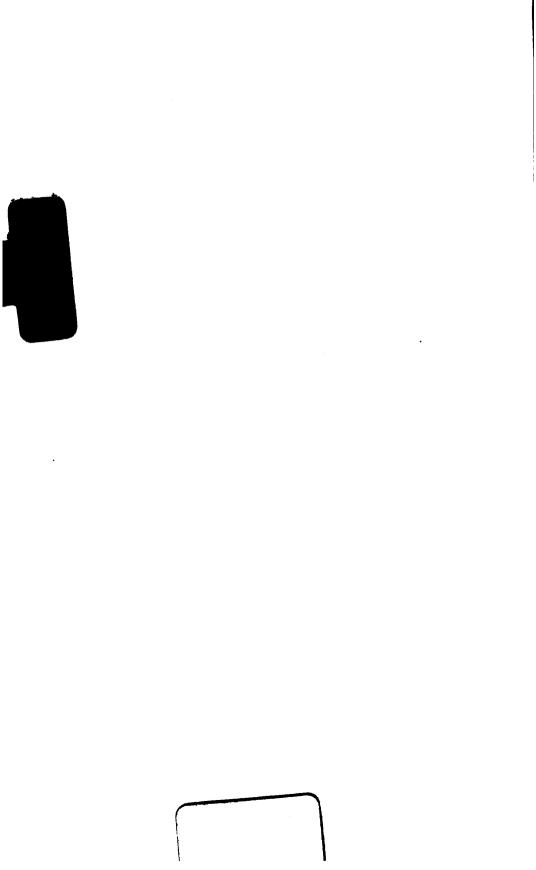
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THE

# REVISED REPORTS

BEING

A REPUBLICATION OF SUCE CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785.

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

SIR FREDERICK POLLOCK, BART., D.C.L., LL.D., OF LINCOLN'S INN.

ASSISTED BY

O. A. SAUNDERS, J. G. PEASE AND ARTHUR B. CANE, (COMMON LAW CASES).

ALL OF THE INNER TEMPLE,

BARRINTERR-AT-IAW.

VOL. LXVI.

1844-1845.

1 COLLYER; 6 QUEEN'S BENCH; 7 MANNING & GRADER 8 SCOTT, N. R.; CARRINGTON & MARSHMAN, 12 JAV

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# PREFACE TO VOLUME LXVI.

EXPERIENCE continues to show that the early Victorian reports are not always to be trusted without criticism and collation. In *Theolites* v. *Foreman* we find (p. 129) that there was an appeal to the Lord Chancellor, reported only in the *Jurist*. In *Smith* v. *Green*, p. 180, the minutes have been supplemented and the head-note corrected from a note in a later volume of Collyer.

A daring attempt to stop the transformation of the Law Society from a profit-sharing company into a great professional institution, which for the moment was successful, is recorded in Ward v. The Society of Attornies, p. 101. In Henderson v. Henderson, p. 384, we have a solemn decision that a decree of a court of equity which ascertains a balance due from the defendant to the plaintiff and orders payment thereof does create a legal debt. A few samples of Vice-Chancellor Knight Bruce's humour may be found in various places, but they are not yet of the best. Perhaps this may be due to the timidity of his early reporters rather than to a later development of his quite individual faculty.

Keir v. Leeman, p. 392, is still the leading case on the invalidity of agreements for the compromise of criminal offences. Elwood v. Bullock, p. 429, is of some importance on the point that a highway may be presumed, on sufficient evidence of such usage, to have been dedicated to the public subject to interruptions for a limited time and a reasonable surpose. Young v. Hichens, p. 500, shows that having nearly night pilchards is not the same thing as quite catching

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them, and does not make the would-be captor a possessor; he therefore cannot have an action of trespass against a person who wilfully spoilt his catch. It would seem, on the general current of modern authorities, that the plaintiff might have said Mani had his remedy by a special action on the case; indeed this must be so if Holt's statement that "he that hinders another in his trade or livelihood is liable to an action for so hindering him" (Keeble v. Hickeringill, 11 R. R. 273, n.) a Books; be good law. Whether the criticism passed on that case 2 h grout in Allen v. Flood [1898] A. C. 1, is or is not to be written at considered as annulled or modified by Quinn v. Leathem [1901] A. C. 495, is one of the minor problems arising from the comparison of those two decisions; both of which English lawyers are bound to accept as correct and incapable of variation save by the Legislature. Ex parte Besset, p. 465, appears to be the first reported case arising out of an extradition warrant. Howard v. Gossett, p. 871, shows a later stage of the troubles arising from the great case of Stockdale v. Hansard, 48 R. R. 326.

Wilmshurst v. Bowker, p. 806, exemplifies the loose way in which the term "stoppage in transitu" could be used even towards the middle of the nineteenth century. The action is stated to have been for a wrongful stoppage in transitu; but, as the judgment in the Common Pleas points out, this is not correct; for there was no question of the buyer being insolvent, and the seller's right, if any, could only be under a reservation to himself of the power of disposal, which prevented the goods from being unconditionally appropriated to the contract.

Jenkyns v. Usborne, p. 767, illustrates the beneficent; leaning of our Courts towards giving the rights of an unpaid vendor as to lien and stoppage in transitu to everyone who it substantially in that position; as here, a sub-purchaser w

had acquired only a right to a share in the goods not yet set apart.

The latter part of the volume is enriched by several of Serjeant Manning's learned notes, including (p. 666) a discussion on the nature of freehold estates determinable at will, where Manning is certainly right against the Court; a translation (pp. 762, 763) of more than one case in the Year Books; and a caustic remark (p. 843) on the injustice done by grounding the action for seduction upon the fiction of servitium amisit.

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OF THE

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1844-1845.

(7 & 8 Vior.—8 & 9 Vior.)

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SIR FREDERICK THESIGER, 1844—1845	. }	Solicitors-General.
SIR FITZROY KELLY, 1845-1846 .	.)	

(1) The description of Mr. Justice Erskine as a knight in the earlier volumes of Manning and Granger's Reports was erroneous. As a peer's son he would not have been knighted in the ordinary course; and the lists of the Judicial Committee in Moore's Privy Council Reports, and of the Benchers of Lincoln's Inn in the Law List down to 1863 (confirmed by the description of the Right Hon. Thomas Erskine in a deed of which a copy is before me), show that in fact he was not.—F. P.

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## CHANCERY.

# BOOTH v. VICARS (1).

(1 Coll. C. C. 6—12; S. C. 13 L. J. Ch. 147; 8 Jur. 76.)

A testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., to be equally divided between them, share and share alike, if then living; but, if dead, to go and be equally divided to and amongst the respective next legal representatives of A. and B., share and share alike. A. and B. died in the lifetime of the testator's widow: Held, that the next of kin of A. and B., according to the Statute of Distributions, living at the death of the testator's widow, were entitled to the fund per stirpes.

RICHARD VICARS, by his will, after directing the payment of his just debts, legacies, and funeral expenses, and devising his real estate to his wife, Sarah Vicars, for her life, and after her decease to Nicholas Vicars and Mary Brown, the wife of James Brown, and making several specific and pecuniary bequests, gave and bequeathed all the rest and residue of his personal estate and effects to trustees, upon trust, that they should, as soon as might be after his decease, sell and dispose of such parts thereof as should not at his death consist of ready money, and should collect, receive, and get in all debts due and owing to him, and should place or put out the monies which should arise by such sale or sales, and which should be received and gotten in as aforesaid, and also his ready money, upon such good and sufficient security or securities at

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<sup>(1)</sup> Stockdale v. Nicholson (1867) L. R. 4 Eq. 359, 36 L. J. Ch. 793, 16 L. T. 767.

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[ \*7 ]

[ \*8 ]

interest, as to them his said trustees should seem meet, and should stand and be possessed of the said residue and securities upon trust to pay the interest, dividends, and annual produce thereof unto his the testator's wife for her life, for her sole and separate "And from and after the decease of my said wife, then upon this further trust, and my will is, that the residue of my goods, chattels, stock in trade, personal \*estate and effects, and the securities whereon or upon which the same or any part or parts thereof shall or may be vested or placed, shall by them, my said trustees or the survivor of them, or the executors or administrators of such survivor, be assigned to and go and be paid unto and to the use of the said Nicholas Vicars and Mary Brown, the wife of the said James Brown, to be equally divided between them, share and share alike, if then living; but, if dead, to go and be equally divided to and amongst the respective next legal representatives of the said Nicholas Vicars and Mary Brown, share and share alika."

The testator left his widow Sarah Vicars, and also Nicholas Vicars and Mary Brown, surviving him. Sarah Vicars died in 1838, having survived both Nicholas Vicars and Mary Brown. Nicholas Vicars had six children, of whom one only, Elizabeth Credland, was living at the death of Sarah Vicars. Mary Brown had five children, two of whom, namely, Edward Brown and Elizabeth Coulthard, were living at that period. The pre-deceased children, however, of Nicholas Vicars and Mary Brown had children who were living at the death of Sarah Vicars, and they, together with the surviving children of Nicholas Vicars and Mary Brown, were found by the Master to be the next of kin of Nicholas Vicars and Mary Brown living at the death of Sarah Vicars.

At the time of the institution of this suit, Elizabeth Credland and Edward Brown were respectively the executrix and administrator of Nicholas Vicars and Mary Brown.

The bill was filed by the surviving executor under the will, for the purpose of having the fund distributed under the direction of the Court; and the cause now came on for hearing for further directions.

Mr. Sidebottom, for the plaintiff.

Mr. Simpkinson, for William Vicars, the son and administrator \*of William Vicars, who was the son of Nicholas Vicars, and

died in the lifetime of Sarah Vicars, [cited Cotton v. Cotton (1) to show that the words indicated the statutory next of kin].

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[ 10 ]

Mr. Hislop Clarke, for Elizabeth Credland and Edward Brown, [claimed either as legal personal representatives or as nearest of kin of Nicholas Vicars and Mary Brown, and cited Saberton v. Skeels (2), Price v. Strange (3), and Smith v. Campbell (4)].

Mr. Faber, for Elizabeth Coulthard, and the children of deceased children of Mary Brown, observed that the division must be in moieties. Upon the force of the words, "next legal representatives," he cited Bridge v. Abbot (5).

Mr. M'Christie, for other parties.

In the course of the argument, the Vice-Chancellor referred to Elmsley v. Young (6) and Clapton v. Bulmer (7).

#### THE VICE-CHANCELLOR:

The whole language of this bequest seems to me of necessity to exclude the notion, that, under the words "next legal representatives." the executors or administrators of Nicholas Vicars and Mary Brown could take for the benefit of those executors or administrators themselves, as beneficial legatees. It is impossible to suggest that such a construction could be right.

The next question is, whether the true construction of the bequest is, that the executors of Nicholas Vicars and Mary Brown were intended to take in their character of executors or administrators. that is, not beneficially; a meaning of which, when the context allows or does not forbid it, the words "legal representatives" are susceptible. There are several remarks, however, to which this clause is liable, which seem to exclude that interpretation also. For, in the first place, I do not say in materiality, but in order, the words "executors or administrators" are used just above for another purpose, in their strict, \*legal, and proper sense, and therefore, if he had meant executors and administrators here, the probability is, that he would have used the same phrase. In the second place, he has used the word "next" in combination with

[ \*11 ]

<sup>(1) 50</sup> R. R. 99 (2 Beav. 67).

<sup>(2) 32</sup> R. R. 284 (1 Russ. & My. 589).

<sup>(3) 22</sup> R. R. 266 (6 Madd, 159).

<sup>(4) 13</sup> R. R. 224 (19 Ves. 403).

<sup>(5) 3</sup> Br. C. C. 225.

<sup>(6) 39</sup> R. R. 146 (2 My. & K. 780).

<sup>(7) 51</sup> R. R. 287 (5 My. & Cr. 108).

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[ \*12 ]

the words "legal representatives," which is a word having no connexion with the character of executor or administrator. And, thirdly, that construction would render the latter half of the bequest mere superfluity, because, supposing that by the words in question executors or administrators are meant, the fund would go in the same way without those words as with them. These are part of the considerations which seem to me to exclude that construction also. It follows, if this view of the subject be right, that the words "next legal representatives" must in this will import, in some form, consanguinity: the next question is, in what form?

Now, the words here are not "next of kin." There is no word strictly importing kindred. If the words had been "next of kin," or "nearest," or "next in relationship," it is possible that I might have applied the rule adopted by the Lords Commissioners in Elmsley v. Young, and have held, that the representatives of whom the statute speaks were excluded. But that is not so. "legal representatives" are the very words which in the Statute of Distributions are used to designate persons who, being of kindred to the deceased, come in as representatives of some one else. to this part of the case, I need do no more than refer to the language of the Master of the Rolls in Rowland v. Gorsuch (1), and to the expressions so recently used by Lord Langdale in Cotton v. Cotton (2), where he says, "When it is said that the expression 'legal representatives' means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons, who, \*upon the construction of the will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. I must, therefore, refer to the Statute of Distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words." I also am of opinion upon this will, that the words "next legal representatives" mean the persons, who, by force of law, in right of consanguinity, would take the personal estate of those persons beneficially.

The next question is, whether they are to take per stirpes, or per capita. My opinion is, that they take per stirpes. The word "representatives" itself almost forces that interpretation: and when you consider, that, if one of the two persons mentioned in the will had survived the tenant for life, only a moiety could have gone

<sup>(1) 2</sup> Cox, 187.

under the clause of substitution,—that construction seems to be rendered absolutely necessary.

BOOTH v. VICARS.

The next question is, at what period the representatives of each particular stirps are to be ascertained; whether at the death of Nicholas Vicars or Mary Brown, or at the death of the tenant for life? That has struck me as the most doubtful question upon this will; but my present impression is, that there is sufficient on the will to indicate an intention in the testator that those persons should take who filled that character when the fund came into possession. The word "then" is not conclusive upon the point, but, at the same time, it is not to be disregarded. This is to be considered as my opinion, unless, in the course of this week, I should mention the case again. If I should not, the fund will be declared to be divisible in moieties amongst the next of kin of Nicholas Vicars and Mary Brown living at the death of Sarah Vicars, that is per stirpes.

# JUMPSON v. PITCHERS (1).

(1 Coll. C. C. 13-15; S. C. 13 L. J. Ch. 166.)

In 1772, a woman, who was a party to a suit in Chancery, and who was married, but whose marriage did not appear in any of the proceedings in the suit, was by an order in the suit, treating her as a feme sole, directed to convey a freehold estate to F., a purchaser. She afterwards, together with her husband, executed a conveyance of the estate to F., in which conveyance the husband covenanted with F. that he and his wife would levy a fine of the estate. It did not appear that a fine was ever levied. On a bill filed by a vendor, claiming under F., against a purchaser, for specific performance, the purchaser objected to the title, on the ground of the want of a fine and the defectiveness of the proceedings in Chancery: Held, that the objection was not one of title, but of conveyance, inasmuch as the order in Chancery, notwithstanding its informality, was binding on the married woman, and rendered her a trustee for the purchaser, and she was therefore compellable to complete the legal title.

EDWARD HARRIS devised a freehold estate to his wife Eleanor, and his daughter, Sarah Harris, as tenants in common in fee, and died in 1770. After his death, a creditors' suit was instituted against his executors and devisees; and by a decree made in the cause, it was ordered that the estate should be sold, and that all proper parties should join in the conveyance. On the 18th June, 1772, the Master reported that Elms Foster was the best bidder for,

(1) The validity of an order of Court see Conveyancing Act, 1881, s. 70.— is now indisputable as against a O. A. S. purchaser claiming under the order:

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[ \*14 ]

and purchaser of, the estate. This report was confirmed absolute by an order dated the 14th July, in the same year. On the 20th July, it was ordered that Foster should pay the purchasemoney into Court, and be let into possession of the estate; and that all proper parties should join in the conveyance to him. On the 8th August, the Accountant-General signed his receipt for the purchase-money.

On the 14th of July, 1772, the day on which the report was confirmed absolute, Sarah Harris married Thomas Jones. There was nothing, however, in the above-mentioned orders and receipt from which the fact of such marriage could be inferred.

By indentures of lease and release, dated the 3rd and 4th of September, 1772, after reciting the above orders and the marriage, Eleanor Harris, and Thomas Jones, and Sarah his wife, conveyed and released the estate to Foster in fee; and Jones covenanted with Foster, that he, Jones, and his wife would levy a fine of the estate, in or as of the ensuing term. It did not, however, appear that a fine ever had been levied of the estate pursuant to the covenant.

Under these circumstances, it was contended by the defendant in the present suit, who was the purchaser of the \*estate, and against whom the present bill had been filed to enforce the completion of the purchase, that, by reason of the irregularity of the orders, and of a fine not having been levied, the plaintiff, who claimed under Foster, had not made a good title; and the defendant took an exception to the report of the Master, who had found in favour of the title.

On the argument of the exception, it was said at the Bar, but there was no proof of the fact, that in the year 1779 or 1780, Mr. and Mrs. Jones left Downham, in Cambridgeshire, where they had lived, and went and settled at George Town, in South Carolina.

Mr. Wigram and Mr. Spurrier, for the defendant [in support of the exception, referred to Esdaile v. Stephenson (1)].

Mr. Russell and Mr. Addis, for the plaintiff.

Mr. Speed, for other parties.

#### THE VICE-CHANCELLOR:

A person indebted devises his real estate to two women as tenants

(1) 23 R. R. 248 (6 Madd. 366).

e. Pitchers.

[ \*15 ]

in common in fee. A creditors' bill is filed to have the testator's debts paid. A decree is made against the propriety of which nothing has been suggested, and therefore nothing can, I suppose, The decree directs a sale of the estate; the estate is sold under it, and I must assume that it has \*been regularly and properly sold. An order was obtained, confirming the purchase nisi, and nothing has been said against the regularity of that order. One of the devisees then marries, and on the day of the marriage an order is made confirming the purchase absolute; and by a subsequent order the purchaser is directed to pay his purchasemoney into Court and be let into possession, and a conveyance was to be executed. The two orders, which were made after the marriage of the devisee, mention her by her maiden name only. It would have been more correct to have added the name of the husband, but the omission of it does not, I apprehend, invalidate the orders. The conveyance, however, which was directed to be executed, is executed by the unmarried devisee, by the husband of the other devisee, and by the wife, as far as it was possible for her That a complete equitable title was obtained by the purchaser, it is impossible to doubt, and it is equally impossible to doubt that a complete legal title was obtained by him to one moiety of the estate, though not to the other moiety, by reason of the marriage. But I apprehend that the married devisee, under the orders of the Court which bind her, became absolutely a trustee for the purchaser, and was compellable to complete the legal title. That being so, I apprehend that the question was one not of title, but of conveyance.

Overrule the exception without prejudice to the question, whether the legal estate in an undivided moiety of the property is or is not outstanding in Mrs. Jones, or any person or persons claiming under or through her. 1844. Jan. 29, 30.

KNIGHT BRUCK, V.-C.

[ \*17 ]

## RAVENSCROFT v. FRISBY.

(1 Coll. C. C. 16-24; S. C. 13 L. J. Ch. 153.)

Before the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), where legacies were charged on real estates which were heavily incumbered, and the testator's debts apparently absorbed all the other available assets, there was no settled presumption of payment of the legacies, and it is doubtful whether a legatee whose only available remedy is redemption of a heavily mortgaged property can be said to have a present right to receive the legacy within the meaning of that Act.

VALENTINE MORRIS, who was for some years Governor of the Island of St. Vincent, by his will, dated in December, 1788, directed that all his legacies and funeral and testamentary expenses should be first paid and satisfied, and he subjected and charged all his estates, real and personal, with the payment of the same. He then gave numerous legacies, amounting nearly to 8,000l., (amongst them three legacies of 100l. each to his sisters Catherine Morris and Sarah Wilmot), and subject as aforesaid, he gave all his real estates, as to a moiety thereof, to Valentine Henry Wilmot for life, with remainder to Charles Ravenscroft and Sarah his wife for their lives, with remainder to Valentine John Ravenscroft. their son in fee, in case he should leave children, with a limitation, in case he died without children, to their daughter Louisa Ashley, in fee; and as to the other moiety, to Charles Ravenscroft and Sarah his wife, for their lives, with remainder to such uses as Sarah Ravenscroft should appoint. All the residue and remainder of his real and personal estate he devised to Charles Ravenscroft absolutely. And he appointed Tyrrell Herbert and William Taylor his executors in the West Indies, and Dunn his executor in England.

By a codicil, the testator directed that 500l. should be paid to Charles Ravenscroft and Sarah his wife, out of the moiety of his real estate first devised.

The testator died in 1789, greatly embarrassed in his affairs. At the time of his death he was owner of five plantations in the Island of Antigua, viz. two called Crabbs and Loobys, which were mortgaged for 8,086l. to the assignees of one Ballmer, Jolly Hill, which was charged with annuities, but was under an agreement for sale to the annuitants in full satisfaction of their demands, and Willoughby \*Bay, which was subject to a mortgage for 3,000l. The estate called Crabbs was likewise subject to incumbrances prior to that of Ballmer's assignees. All the estates were in the possession of incumbrancers.

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Herbert and Dunn, two of the testator's executors, renounced probate of the will: but in January, 1791, letters of administration with the will and codicil annexed were granted at the highest probate duty to Whytell in England for the use of the remaining executor, Taylor, in St. Vincent; and in November, 1803, Taylor himself proved the will in England. In 1809 and 1810 two several sums of 2,400l. and 836l. were received by Taylor from the Government on account of the testator's estate. In 1815 Taylor died.

In 1816, and prior to the date of the deed after mentioned, the debt due to Ballmer's assignees had, in consequence of their having paid off the prior incumbrances on the Crabbs estate, and by the accumulation of interest and otherwise, amounted to 16,558l.

By an indenture dated the 1st April, 1816, and made between Valentine Henry Wilmot, of the first part; Charles Ravenscroft and Sarah his wife, and Valentine John Ravenscroft, of the second part; and Frisby and others, assignees of Ballmer, of the third part; after reciting that the legacy of 500l. given to Charles Ravenscroft and his wife still remained unpaid, and that they had consented to accept the sum of 800l. for principal and interest in respect of that legacy, which sum of 800l. was meant to be in full satisfaction and discharge of the said legacy of 500l. and all interest due and payable in respect of it, and reciting that the sum of 16,5581. was then due to the assignees from the estate of the testator, and that it was altogether impracticable to recover this sum from the yearly proceeds of the testator's estate; and that, with a view to have all the property of the testator absolutely sold, without the expense \*and delay of litigation, such arrangement as thereinafter mentioned had been agreed to; it was witnessed, that, in consideration of 2,000l., part whereof was expressed to have been paid, and the residue agreed to be paid, in the manner therein mentioned, by the assignees to Valentine H. Wilmot, in respect of all his rights and interests in the real estates of the testator, the said V. H. Wilmot agreed to sell all such rights and interests to the assignees: and it was further witnessed, that, in consideration of 800l., part whereof was expressed to be paid, and the residue agreed to be paid, in the manner therein mentioned, by the assignees to Charles Ravenscroft and Sarah his wife, in respect of the legacy of 500l. by the said testator so given to them as aforesaid out of the moiety of his real estates, and also in consideration of the benefits eventually provided for the parties thereto

[ \*18 ]

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[ \*19 ]

of the second part, they the said parties thereto of the second part agreed to sell to the assignees all their rights and interests whatsoever in the real and personal estates of the testator. And it was thereby declared that the assignees should make absolute sale of all the testator's real estates, and should collect, get in, and recover all his outstanding and other personal estate, and that they should hold the money to arise from such sales upon trust to apply the same, first, in payment of the costs and charges incident to the said indenture and sale, and in payment to the assignees of the said debt of 16,553l., and of the said sums of 2,000l. and 800l., and all other principal monies then due to them from the estate of the said Valentine Morris; and, in the next place, in payment of all other the lawful charges and incumbrances upon the estates and property so to be sold, then late of the said Valentine Morris, according to their order and lawful priority; and to pay over the residue to the several parties thereto of the second part, according to their respective rights, shares, and lawful claims therein and thereto.

In 1817, there being no personal representative of Taylor, \*administration de bonis non of the testator's effects was granted to the assignees of Ballmer.

Large sums were received and applied by the assignees in pursuance of the trusts of the indenture of 1816, and ultimately the trusts of that deed were satisfied as to the specific debts therein, and a considerable sum of money and unsold property were left in their hands.

Sarah Ravenscroft died in 1818, without having dealt with the property in any other way than as before mentioned; and Valentine John Ravenscroft died in 1828, without leaving any issue.

The bill was filed in 1830, by Charles Ravenscroft and Louisa Ashley, who, in the events that had happened, claimed to be entitled to the surplus property, against the assignees, and the personal representatives of Catherine Morris and Sarah Wilmot, praying for accounts of the property conveyed under the deed of 1816, and of the monies received and applied by the assignees under that deed, and that the surplus monies might be paid, and the unsold property conveyed to the plaintiffs.

Charles Ravenscroft died pending the suit.

By the decree made on the hearing of the cause, in 1836, it was referred to the Master to make the inquiries prayed for by the bill, and to take an account of the legacies of the testator.

Claims were made before the Master for the three legacies of

100% each, bequeathed to Catherine Morris and Sarah Wilmot, with interest from the end of a year from the testator's death.

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Payment of these legacies being resisted on the ground of lapse of time, the claimants, in order to meet this objection, relied, first, on the circumstances under which the deed of 1816 was executed; secondly, the length of time, namely, from 1816 until shortly before the filing of the bill, during which it was necessary for the assignees to \*be in possession for the purposes of their trust, and during which they had, gradually only, paid off the testator's debts, and settled all the claims against his estate; and, thirdly, several letters from the testator's men of business and relations in the West Indies, to his relations in this country, extending over a period of six or seven years after his death, from which it appeared that the testator's affairs had been left in a state of the greatest complication and embarrassment, and that whatever personal property might at that time have come to the hands of his executor in the West Indies was probably absorbed by the testator's debts.

[ \*20 ] ·

There was no evidence of any other claims for legacies having ever been made than those which have been mentioned.

The Master, by his report, dated in December, 1843, found, that, more than forty years having elapsed since the death of the testator, twenty-seven years of which expired between the day of his decease and the 1st of April, 1816, the legacies bequeathed by him must be presumed to have been satisfied; and he was of opinion and found, that nothing was then payable to the legatees out of the real and personal estate of the testator.

To this report exceptions were taken by the representatives of the three legatees.

Mr. Russell and Mr. Caley Shadwell, for the exceptions:

\* The question was one of presumption only, and here the presumption arising from lapse of time was rebutted by the circumstances. The legatees, therefore, on the record would be entitled; and their title would let in the others not on the record:

Tollner v. Marriott (1). \* \*

[21]

Mr. Younge, for the defendants, the assignees of Ballmer.

Mr. Wigram and Mr. Lee, for the plaintiff, in favour of the
(1) 33 R. R. 88 (4 Sim. 19).

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[ \*23 ]

report [cited Sheppard v. Duke (1), Sterndale v. Hankinson (2), Piggott  $\nabla$ . Jefferson (3)].

(THE VICE-CHANCELLOR: If the deed of 1816 created a trust for the legatees, the question upon the statute is at an end. that deed create such a trust, or could you, as between the legatees and that deed, interpose any rule or principle drawn from Lord Lauderdale's case ? (4).)

[ \*22 ] That \*deed, being a contract between Wilmot and Ravenscroft and the assignees only, might have been annulled at any time with the consent of those parties. \* The Court, however, is relieved from any difficulty on this subject by the provisions of the Legislature.

> (THE VICE-CHANCELLOR: Can it be said, in a case where a testator's estate is so heavily charged with mortgages that it is uncertain whether a legatee will ever be paid his legacy, that he has a "present right to receive" it within the meaning of the statute?)

Mr. Hall appeared for other parties.

#### THE VICE-CHANCELLOR:

The trusts of the property to be administered in this suit are the trusts declared of the property comprised in the deed of the 1st April, 1816.

These trusts now to be performed, so far as they are unperformed, are in part for payment (after deducting some charges) of "all other the lawful charges and incumbrances upon the estates and property so to be sold, late of the said Valentine Morris. according to their order and lawful priority, and to pay over the residue unto the said several persons, parties hereto of the second part, their executors, administrators, and assigns, according to their respective rights." I am of opinion, that, plainly, the legacies given by Valentine Morris came within these words, "lawful charges and incumbrances," \*and, independently of that construction, would have been plainly due in point of honesty and justice. But, supposing that these parties of the second part could receive nothing till the legacies were paid, still such a time might have passed, such circumstances might have arisen, as that there might

<sup>(1) 47</sup> R. R. 319 (9 Sim. 567).

<sup>(4)</sup> Garrard v. Lord Lauderdale,

<sup>(2) 27</sup> R. R. 210 (1 Sim. 393).

<sup>30</sup> R. R. 105 (3 Sim. 1).

<sup>(3) 56</sup> R. B. 1 (12 Sim. 26).

be no legacies to pay, and that, in that sense, the words "charge and incumber" might not have a subject on which to operate.

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The first question, therefore, is, whether there is ground for coming to the conclusion that it may be presumed that the legacies. or any of them, were at this period satisfied. Morris had died in He had left his property in an extreme state of embarrass-It was improbable that the assets could ever be sufficient for payment of the whole. Of all the property, or almost every thing, the mortgagees were in possession, whose redemption must have preceded the application of that property to legacies or the purposes of the will. Looking at the state of things which continued from the death of Morris to the year 1816, not forgetting the contents of the instrument of April, 1816, I am of opinion that it would be contrary to all probability, and to all reasonable presumption, and a miscarriage of any judge or jury, to suppose, from mere lapse of time, that any one of these legacies was paid. sumption in fact and in law is, that up to that time they were not paid.

In 1816 there was no statutory bar to the claim of legacies. Generally speaking, a long lapse of time might lead to the presumption of payment of legacies, but that presumption, as the like presumption in the case of specialty debts, was liable to be rebutted by circumstances.

Believing that to be the law in 1816, and applying that law to the facts of this case, I must consider these legacies as due in 1816, and their payment provided for by means of a trust, which trust has been decreed to be executed in this Court. If so, it is not necessary to consider the statute. \*I think, however, though it is not necessary to decide the point, that the statute would not apply to this case.

[ \*24 ]

Upon the exceptions and further directions,

Declare, that, having regard to the deed of 1816, and the other circumstances of the case, the facts and circumstances in evidence do not form a sufficient ground for the presumption that the legacies bequeathed by the testator, V. Morris, have been satisfied, or that nothing is now payable to the said several legatees; but this is to be without prejudice to the question, whether by any other evidence the whole, or any of them can be shown to have been wholly or partially satisfied. Let the Master review his report as to the legacies.

1844. Jan. 30, 31. Feb. 8.

## BOUGHTON v. JAMES.

(1 Coll. C. C. 26-47; S. C. 8 Jur. 329; 1 H. L. Cas. 406.)

Knight Bruce, V.-C. [26] [See the report of this case on appeal to the House of Lords reported in 1 H. L. C. 406—489, under the title of Boughton v. Boughton, on which appeal the decision of the Vice-Chancellor in Boughton v. James was affirmed in part (as to the remoteness of some of the bequests), and reversed in part (as to the order of application of the real and personal estate in payment of charges imposed thereon by the will).—O. A. S.]

1844. Feb. 9.

Knight Bruce, V.-C.

[47]

# HALL v. FISHER (1).

(1 Coll. C. C. 47-53; S. C. 8 Jur. 119.)

A devise of "all that freehold farm called the Wick Farm, containing 200 acres or thereabouts, occupied by W. E., as tenant to me, with the appurtenances," to uses applicable to freehold property only. At the date of the will, and of the death of the testator, W. E. held, under a lease from the testator, 202 acres of land, which were described in the lease as the Wick Farm. Of these, twelve acres were leasehold: Held, that the twelve acres did not pass by the devise.

THEOPHILUS WHARTON and Brian Wharton were seised in fee, in equal moieties as tenants in common, of a freehold farm at Headington, in the county of Oxford, called the Wick Farm, which comprised, among other lands, a piece of land called Great Hill Ground, containing 19 a. 3 r. Theophilus Wharton was also possessed of a leasehold farm in Headington, called the Headington Farm, held under a lease for years of the president and scholars of Magdalen College, Oxford.

In October, 1825, it was agreed between the Whartons and Magdalen College, that Theophilus Wharton should, under the Land-tax Redemption Acts, purchase of the college a piece of land (parcel of the leasehold farm) which was lying opposite his residence, and that the Whartons should sell to the college 6 a. 1 r. 28 p., part of the close called Great Hill Ground; and that the Whartons should exchange with the college 6 a., further part of the Great \*Hill Ground, for certain lands belonging to the leasehold farm which were lying intermingled with the Wick Farm.

[ •48 ]

<sup>(1)</sup> Distinguished and questioned by 31 Ch. D. 314, 55 L. J. Ch. 365, 54 CHITTY, J., in Re Bright-Smith (1886) L. T. 47.

This agreement was carried into execution by indentures of lease and release, dated the 7th and 8th October, 1820, and by an indenture of exchange of the latter date. Notwithstanding this arrangement, however, the 6 a. 1 r. 20 p. and the 6 a. continued to be treated and occupied by the Whartons as part of Wick Farm, the lands being, in fact, in their personal occupation.

HALL 7. Fisher.

Theophilus Wharton died in October, 1831, having by his will, after devising a farm at Sutton, in the county of Oxford, as therein mentioned, devised all other his freehold and real estates to the use of his brother Brian for life, remainder to the use of his nephew Mark Theophilus Morrell in fee. And he devised all his leasehold messuage, farm, lands, and premises situate at Headington, and which he held as lessee under Magdalen College, to his said nephew Mark Theophilus Morrell, his executors, administrators, and assigns.

On the decease of Theophilus Wharton, Brian Wharton entered into possession of the Wick Farm, including therein the whole of the Great Hill Ground; and this was acquiesced in by Morrell, who at the same time took possession of the leasehold farm, exclusive of the Great Hill Ground.

By an indenture dated the 6th August, 1837, the college renewed the lease of the Headington Farm to Morrell, including therein the 6 a. 1 r. 28 p. and 6 a.

By an indenture dated the 29th September, 1838, Brian Wharton demised the Wick Farm by that description, and also described as containing by admeasurement 202 acres, more or less, to William Eeley, to hold to him, his executors, &c., for fourteen years. To this indenture was annexed a schedule of the demised lands, and in the schedule was mentioned Great Hill Ground. Immediately upon the \*execution of this lease, Eeley entered upon and took and continued in possession of all the premises comprised in it.

[ \*49 ]

Brian Wharton died in April, 1839, having by his will devised his moiety of "all that freehold messuage or tenement, farm, lands and hereditaments called the Wick Farm" to his wife Catherine for her life, with an ultimate remainder to Morrell in fee.

Upon Brian Wharton's death, his widow and Morrell shared the rents of the Wick Farm as occupied by Eeley in moieties.

Mark Theophilus Morrell, by his will, dated the 17th of November, 1841, devised as follows: "I give and devise all that the one undivided moiety or equal half part which was devised to me in and by virtue of the will of my uncle Theophilus Wharton,

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[ \*50 ]

of and in all that freehold farm called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley as tenant thereof to me, with the appurtenances, to the uses, upon the trusts, and in the manner following:" (Here followed a devise to trustees upon trust for the testator's sister Mrs. Stone for life for her separate use, with remainders to such persons as she should appoint, and with an ultimate limitation to the use of testator's brother. James Morrell the younger, in fee.) "And I give and devise all that the other undivided moiety or equal half part which was devised to me in and by virtue of the will of my late uncle Brian Wharton, subject to an estate for life thereby given to Mrs. Catherine Wharton his widow, of and in the said freehold farm, called the Wick Farm, with the appurtenances, subject to the life estate of the said Catherine Wharton, to the uses, upon the trusts, and in manner following, that is to say, to the use of my brother, the said James Morrell the younger, for his life," &c. (Here followed a series of limitations all applicable to freehold The will then provided that it should be lawful for \*the owners or owner for the time being of the first legal estate of freehold in possession of each of the said moieties of the Wick Farm, to demise and lease the said farm, in moieties or altogether, unto any person or persons for any term or terms of years not exceeding twenty-one years in possession, for the best rent that could be obtained for the same, and upon such other terms as should be deemed reasonable, so that such rent were reserved so as to be incident to, and go along with, the freehold and reversion of the said premises. The testator then devised his freehold messuage at Sutton, and also all his leasehold farm-house, homesteads, lands, and tenements, at Headington aforesaid, containing about 170 acres, held under Magdalen College, Oxford, and then in the occupation of Thomas Burrows, jun., as tenant to him, with their respective appurtenances, unto and to the use of John Fisher and James Westell, a solicitor, their heirs, executors, administrators, and assigns, upon trust with all convenient speed after his decease to make sale and absolutely dispose of the said last-mentioned freehold and leasehold premises respectively, and to apply the monies arising from such sale in payment (after the discharge of incidental expenses) of all his debts, and all his funeral and testamentary expenses, in exoneration, so far as the same would extend, of his personal estate from the payment of such debts and expenses, and he gave the residue of the monies to arise from such sale unto

the said John Fisher and James Westell. And he gave, devised, and bequeathed all his real estate not thereinbefore devised or disposed of, and all his residuary personal estate, unto his father James Morrell, Esq., his heirs, executors, administrators, and assigns, absolutely, subject only to the payment of such of his debts as the monies produced by the sale of the said premises comprised in the aforesaid trusts for sale should be insufficient to pay. And he appointed the said John Fisher and James Westell joint executors of his will.

The testator, Mark Theophilus Morrell, died in January, 1842.

The bill, which was filed by the trustees and devisees of the Wick Farm under Morrell's will against his executors, and the husband of Mrs. Stone, after alleging that it was not necessary for the payment of the testator's debts to resort to the 6 a. 1 r. 28 p. and 6 a., prayed that it might be declared that the description in the will, "all that freehold farm called Wick Farm, in Headington aforesaid, containing 200 acres or thereabouts, and occupied by William Eeley, as tenant thereof to me, with the appurtenances," comprised the two pieces of land containing respectively 6 a. 1 r. 28 p. and 6 a., and that the same were effectually devised and bequeathed by the said will as parts of the Wick Farm for the benefit of the plaintiffs, Emily Stone and James Morrell the younger, and that the defendants, the executors, might assent to such devise and bequest of the said two pieces of land accordingly, and that, in order to such assent, all proper accounts might, if necessary, be taken, to ascertain the state of the assets of the said testator Mark Theophilus Morrell, and to clear his estate, as in the ordinary case of suits by specific legatees for their legacies.

The cause was heard on bill and answer. The executors, by their answer, admitted that the Wick Farm, at the time of making the will, did not contain more than 202 [a. 4 p., or thereabouts, including the two pieces of land in question; but they denied (in answer to a charge contained in the bill) that the leasehold farm, at the time of making the will, comprised 170 acres, exclusive of the two pieces of land. On the contrary, they stated, that, without those two pieces, it did not exceed 140 acres in extent. They admitted that the two pieces of land were never in the occupation of Thomas Burrows, jun. (1).

(1) The executors claimed the two pieces of land in question as being comprised in the bequest to them of the leasehold tenements at Headington; but the COURT gave no opinion upon this point. HALL v. Fisher

[51]

HALL t. FISHER. [ 52 ] Mr. Russell and Mr. Chandless, for the plaintiffs:

In Doe d. Dunning v. Lord Cranstoun (1), PARKE, B., says, "The rule is, that, where any property described in a will is sufficiently ascertained by the description, it passes by the devise, although all the particulars stated in the will with reference to it may not be true."

(THE VICE-CHANGELLOR: To that I agree; but is there any case in which, there being a subject to which the words of the will properly and correctly apply, they have been held to apply also to another subject?)

[They also cited Lane v. Lord Stankope (2) and Hobson v. Black-burn (8).]

The Vice-Chancellor, in the course of the argument, referred to Radford v. Southern (4), Miller v. Travers (5) and Arkell v. Fletcher (6).

[ 53 ]

Mr. Wigram and Mr. Parry, for the defendants, were stopped by the Court.

#### THE VICE-CHANCELLOR:

I do not dispute the correctness of the cases which have been cited, but I am unable to view this as a case of what is called *falsa* demonstratio.

The word "freehold," as used in this will, seems to me a necessary part of the description, which cannot be rejected. If it had been omitted, the probability is, that the leasehold in question would have been held to pass. Again, if the whole of the farm had been leasehold, the insertion of the word "freehold" would probably not have been material. But there is a subject here which properly answers the description given in the will. There is a freehold farm called Wick, which contains 200 acres, or thereabouts, (incorrectness, if there be any incorrectness in that respect, is immaterial), and which is occupied by Eeley. Being of opinion that the freehold part of the farm is properly described by those words in the will, although the leasehold should be abstracted from it, I am obliged to say that not any leasehold land, although used

<sup>(1) 56</sup> R. R. 597, at p. 603 (7 M. &

<sup>(4) 14</sup> R. R. 435 (1 M. & S. 299).

**W**. 1, 10).

<sup>(5) 34</sup> R. R. 703 (8 Bing. 244).

<sup>(2) 3</sup> R. R. 197 (6 T. R. 345).

<sup>(6) 51</sup> R. R. 254 (10 Sim. 299).

<sup>(3) 36</sup> R. R. 381 (1 My. & K. 571).

and treated as freehold, can pass under this devise. I regret to be obliged to come to this decision, inasmuch as I think it likely that the testator intended otherwise, but did not sufficiently, or did not accurately, inform his solicitor of the circumstances of the property.

HALL v. Fisher.

Dismiss the bill, but without costs.

### CAPPER v. TERRINGTON.

(1 Coll. C. C. 103-104; S. C. 13 L. J. Ch. 239; 8 Jur. 140.)

1844. Feb. 17.

Three mortgages on the estates of distinct mortgagors were transferred to the same trustees by one deed, which was prepared in the Master's office, in a suit for executing the trust. Upon the application of one of the mortgagors for liberty to redeem and to have the transfer delivered up to him: Held, that he was entitled to have the deed, on his executing to the trustees a covenant to produce it, and paying the costs of the application; and that the costs properly incurred in preparing and settling the covenant should be borne by the mortgagee's estate.

KNIGHT BRUCE, V.-C. [ 103 ]

A TESTATOR, being entitled to three mortgages on the estates of distinct mortgagors, devised them, by his will, to trustees upon certain trusts. The trustees afterwards conveyed the mortgages to new trustees by a single deed which had been settled in the Master's office, in a suit relating to the trust. One of the mortgagors then gave notice of his intention to pay off his mortgage, but the trustees refused to give up the mortgage-deed (1) except upon the terms of the mortgagor entering into a covenant with them to produce it.

The mortgagor now presented his petition, praying for liberty to pay his mortgage-money into Court, and that thereupon his mortgaged estate might be reconveyed, and the mortgage-deed(1) delivered to him.

Mr. Parry, for the petitioner, said, that to ask a mortgagor redeeming to give a covenant to the mortgagee to produce his deeds was altogether a novelty. He stated, however, that the petitioner was not unwilling to do so, provided the respondents would pay the costs of the present application.

Mr. E. F. Smith, for the trustees, and

Mr. Phillips, for the parties beneficially interested in \*the

[ \*104 ]

(1) This expression "mortgage-deed" appears to have been inserted by mistake for "transfer." The mort-

gagor's right to the mortgage deed on redemption was indisputable.—O. A. S.

CAPPER

mortgage fund, declined the terms offered, and insisted on the TERRINGTON. mortgagor's executing a covenant to produce the deed in question: Wetherell v. Collins (1).

#### THE VICE-CHANCELLOR:

Either the mortgagor must have the deed, and execute a covenant to produce it, or the deed must remain with the trustees, they executing to the mortgagor a covenant to produce it. I do not say what I should do if all the mortgagors were present; but having one only before me, I think that he is entitled, if he so elects, to have the deed and execute the covenant. In that case, the deed of covenant must be settled by the Master, if the parties differ.

The costs of this application must be paid by the mortgagor; but as the necessity for the covenant has arisen from the mortgagee or those representing him, mixing the lands comprised in the several securities, the costs of preparing and settling the covenant, so far as they shall be properly incurred, ought, I think, to be paid out of the mortgagee's estate. The latter costs, however, had better be reserved for the present (2).

1844. March 8, 14.

BURDEN v. OLDAKER. (1 Coll. C. C. 105-107; S. C. 13 L. J. Ch. 240; 8 Jur. 418.)

KNIGHT BRUCE, V.-C. [ 105 ]

Where deeds relating to mortgaged property (the mortgage being absolute at law) come into the custody of a court of equity, by means and in the course of a reasonable and proper administration of the mortgagee's estate, the costs of removing them out of Court, upon the mortgage being paid off, must be borne by the mortgagor.

JANE BENNETT, widow, being seised in fee of certain real estates. and possessed of various mortgages and other personal estates, gave and devised all her real estate to Edmund Wells Oldaker and John Wilson, and their heirs, upon trust as thereinafter mentioned; and she directed her trustees to collect, get in, and sell her personal estate, and invest the same in the purchase of lands; and she gave the rents of all the said real estates, and the interest of the personalty until the same should be invested in real estate, to the said John Wilson for his life; and after his decease, she devised the real estates to certain uses in favour of Edward Lucas Burden. an infant, and others; and she made Oldaker and Wilson executors of her will.

<sup>(1) 18</sup> R. R. 229 (3 Madd. 255).

<sup>(2)</sup> See the next case.

The testatrix was at the time of her death possessed of, amongst other mortgages, a mortgage on certain freehold property at Pershore, in Worcestershire, of which John Workman was the owner of the equity of redemption in fee. That mortgage had become absolute in May, 1813.

BURDEN t. OLDAKER.

After the testatrix's death a bill was filed by Edward Lucas Burden against the executors and others, praying that the will might be established as to the real and personal estate of the testatrix, and that the usual accounts might be taken of the personal estate of the testatrix and of her debts, and that the personalty might be applied in payment of her debts in a due course of administration, and that the residue might be ascertained and properly invested.

By the decree made on the hearing of the cause, it was, amongst other things, ordered that all deeds and documents in the hands of the defendants Edmund Wells Oldaker and John Wilson, or either of them, relating to the freehold, copyhold, and leasehold estates of the testatrix, \*and to the mortgages and other securities whereon her personal estate, or any part thereof, was invested, should be deposited with the Master, without prejudice to any application to be made thereafter by any party for the delivery up or otherwise of the said deeds or documents, or any of them.

[ \*106 ]

In pursuance of this decree the deeds relating to the mortgage securities of the testatrix were deposited in the Master's office.

A petition was now presented by Workman for liberty to pay the amount due in respect of his mortgage into Court, and that the mortgage-deed, and title-deeds relating to the mortgaged premises, might be delivered to him. The only question was as to the costs of this application.

Mr. Swanston, for the petitioner.

Mr. Russell, for other parties.

#### THE VICE-CHANCELLOR:

March 14.

This petition, I am informed, has been or is to be amended, and is to be considered as amended, by making it the petition of Mr. Workman (1), who, though not the original mortgagor, is the person entitled to the equity of redemption, and desirous of paying off the mortgage; so amended, however, I understand, as to submit, not

(1) The petition had originally been presented in the name of John Wilson.

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[ \*107 ]

to pay but to abide by any order that the Court may make as to the costs and charges mentioned in the prayer. The parties, I collect, indeed, without reference to the particular terms of the petition, wish the opinion of the Court upon the general question. whether, the mortgage-deed and the title-deeds of the mortgaged estate being in Court in a suit, which this suit is, for performing the trusts \*of the will and for administering the assets of the mortgagee, (purposes foreign to the mortgagor), he ought to pay the costs of obtaining an order for delivering them out of Court to him upon paying off the debt; the instruments having, as I understand, been deposited with the Master by the executors and trustees of the mortgagee's will, under the decree, as a matter of ordinary course, and not in consequence of any default or misconduct of any The mortgage I suppose, became legally forfeited in the mortgagee's lifetime, and the decree appears to have extended to the deposit of all deeds and documents in the hands of the mortgagee's trustees and executors relating to her freehold, copyhold, and leasehold estates, as well as to the mortgages and other securities whereon her personal estate was invested. The nature of her will seems to have rendered this a reasonable measure so In this state of circumstances, I far as her estate was concerned. think that the proper costs of obtaining an order for delivering the mortgagor's deeds out of Court to him fall within the principle on which Wetherell v. Collins (1), and other cases of that description, have been decided, and must therefore be borne by the mortgagor; the deeds having come into the custody of the Court (from which without an order they cannot be removed) by means, and in the course, of a reasonable and proper administration of the mortgagee's estate; of which this mortgage, forfeited in her lifetime at law, though continuing redeemable in equity, formed at her death a part.

1844. March 1, 14.

KNIGHT BRUCE, V.-C. TAYLOR v. BEVERLEY.

(1 Coll. C. C. 108—117; S. C. 13 L. J. Ch. 240; 8 Jur. 265.)

A testator, by his will, directed his executors to place out upon Government security such a sum of money out of the interest thereof, as would be sufficient to produce an annuity of 50%, which he gave unto his daughter I., for her life; and after her decease, in case she should leave issue, he gave the principal unto and equally amongst such issue; but if she should die without issue, he gave the same unto and equally amongst his surviving children and their legal personal representatives, share and share alike.

The testator had four children living at the date of his will and of his death, of whom the daughter I. was the survivor. She died without leaving issue: Held, that the words "surviving children" meant children surviving the daughter I.; and that the words "legal personal representatives" must be construed in their ordinary sense, and not as importing kindred or representatives in blood; consequently, that the fund, of which the testator's daughter was the tenant for life, fell into the testator's residuary estate.

TAYLOR •. BEVERLEY.

THE will of Christopher Beverley, dated in 1822, contained the following bequest: "And, as a provision for my daughter Isabella, the wife of John Howson, who has at present no children, I do hereby order and direct my executrix and executors hereinafter named to place out at interest, upon Government or other good security, such sum of money, part of the said 6,000l., as by and out of the interest thereof will be sufficient to produce one annuity or clear yearly sum of 50l. of lawful English money, which I do hereby give and devise unto my said daughter Isabella Howson, for and during her natural life, to and for her own sole and separate use and disposal, and to be paid to her by four quarterly payments in each year; the first payment to commence and be made at the end of three months next after my decease; and from and after the decease of my said daughter Isabella Howson, in case she shall leave issue, I do give and devise the principal sum or sums of money whereon the said last-mentioned annuity or clear yearly sum of 501. shall be secured as aforesaid unto and equally amongst such issue; but if she shall die without issue, I give and devise the same unto and equally amongst my surviving children and their legal personal representatives, share and share alike." The testator bequeathed the residue of his estate to his son John.

The testator, who had married in 1778, had five children. One of them, a daughter, died an infant and unmarried in 1802. The other children, viz., John, Christopher, Frances Holgate, and Isabella Howson, were alive both when he \*made his will and at the time of his death; of these, Isabella Howson was the survivor. She died without leaving issue.

[ \*109 ]

The bill was filed by the executors and trustees under the testator's will, praying for the directions of the Court as to the fund of which the testator's daughter, Isabella Howson, had been the tenant for life. The question, to whom such fund now belonged, depended upon the meaning of the words "my surviving children. &c."

Mr. Stinton, for the plaintiffs.

TAYLOR BEVERLEY.

[ \*110 ]

Mr. Wigram and Mr. Headlam, for the representatives of John, [cited Cripps v. Wolcott (1), Pope v. Whitcombe (2), Gibbs v. Tait (3), Wordsworth v. Wood (4)1.

The gift to the surviving children is absolute. The words "legal representatives" must have their ordinary import, that is to say, "executors, administrators, and assigns:" Price v. Strange (5), Saberton v. Skeels (6). To give them \*any other meaning, the Court must convert the word "and," which immediately precedes them, into "or."

Mr. Kenyon Parker, Mr. Malins, and Mr. Shee, for the next of kin and personal representatives of Frances Holgate:

The words of survivorship are to be referred to the death of the testator, and not to the death of the tenant for life. [Upon this point they referred to a number of cases which were decided before Cripps v. Wolcott had practically determined the modern rule.]

[With respect to the words "legal personal representatives," they are properly words of purchase; the representatives, or next of kin, taking by substitution: Cotton v. Cotton (7), Booth v. Vicars (8).

[ 112 ] Mr. Birkbeck and Mr. Rolt, for the representatives of Christopher, took a similar line of argument; citing Eyre v. Marsden (9) and Massey v. Hudson (10), and commenting principally on the effect of the words "legal personal representatives."

> Mr. Wigram, [in reply, referred to Shergold v. Boone (11), Crowder v. Stone (12), and other cases.

> Some other authorities cited in argument are referred to in the following judgment.

#### THE VICE-CHANCELLOR: March 14.

[ 113 ] The bequest of which the Court has to decide the construction in this cause is contained in the will of Christopher Beverley in

- (1) 20 B. R. 268 (4 Madd. 11).
- (2) 27 R. R. 32 (3 Russ. 124).
- (3) 42 R. R. 136 (8 Sim. 132).
- (4) 48 R. R. 191 (2 Beav. 25).
- (5) 22 R. R. 266 (6 Madd. 159).
- (6) 32 R. R. 284 (1 Russ. & My. 589).
- (7) 50 R. R. 99 (2 Beav. 67).
- (8) Ante, p. 1.
- (9) 48 R. R. 73 (4 My. & Cr. 231).
- (10) 16 R. R. 158 (2 Mer. 130).
- (11) 9 R. R. 195 (13 Ves. 370).
- (12) 27 R. R. 68 (3 Russ, 217).

these words. (His Honour here read the bequest as above stated.) Four children of the testator having been alive when the will was made, and at his death, of whom Isabella Howson, who has died without leaving issue, was the survivor, the first question argued has been, whether the words "surviving children" ought not to be construed as meaning "other children."

TAYLOR v. Beverley.

It is probably true that where an estate or fund is given between a class or number of persons as tenants in common in tail, or for life, with remainders, or interests in the nature of remainders, to their children respectively, and a valid provision is made, that in the event of the death and failure of issue of any of the original takers, the share of the original taker or takers so circumstanced shall go to the survivors or survivor of them, the words "survivors or survivor" may, in general, well be considered as an expression of contrast, used for the purpose of distinguishing the takers not so circumstanced, and therefore as meaning "others or other;" and so in analogous instances. But is the case the same where, the words being used as here, "surviving children," no interest in any portion of the subject of which the whole or part is so given to "surviving children" has been previously given to those children \*or either of them, if the words are read as "other children?" My impression is, that the word "survivors," the word "survivor," and the word "surviving," ought, in a will, to receive their natural and ordinary construction, that is, to be read as not meaning "other," unless the nature of the disposition itself, in which the expression occurs, or the context of the instrument containing the disposition, renders a departure from that natural and ordinary interpretation necessary to effectuate what the whole of the disposition, from its nature, or the whole of the instrument taken together, shows to have been the testator's intention; and this seems to have been the view taken by the present LORD CHANCELLOR in Crowder v. Stone. In the will before me neither the nature of the particular disposition, nor the context, appears to me to require or justify such a departure; and, I think, accordingly, that the word "surviving" must be read as meaning "surviving," and not as meaning "other;" a construction which, applied to this will, appears to me entirely consistent with the decisions in Doe v. Wainwright (1) and Wilmot v. Wilmot (2).

[ \*114 ]

To what period, then, does the word "surviving," as used by this testator, refer? This, as Sir William Grant said in Newton TAYLOR v. BEVERLEY.

[ \*115 ]

v. Ayscough (1), depends on the testator's intention, to be collected either from the particular disposition or the general context of the will. It has not been argued, and it could not, I think, have well been argued, that anything turns upon the fact that the testator had a child who died before the making of the will. The child is stated to have been a daughter who never married, and whose death happened more than twenty years before the will was made. Nor has it been contended at the Bar, on either side, that had the word "surviving" been omitted, and one of the sons, living when the will was made, died before the testator's death, that son's share under this \*bequest would have fallen into the general residue by lapse. Whether it would or would not. I wish to be understood as not intimating any opinion. But if it would not, then the word "surviving," if to be understood as referring to the time of the testator's death, is surplusage. However this may be, it would not, I think, be a proper construction of the will before me so to read the word "surviving." Considering that Isabella Howson was one of the testator's children living when the will was made and at his death,—considering the event that was to give a title to the persons called the testator's surviving children, and the place in which the expression occurs, I conceive that the phrase "my surviving children," as used in this will, means "my children then living," or (that which is the same) "my children surviving Isabella Howson." If the testator had said, "Upon the death of either of my children a sum of 1,000l. shall go to my surviving children," could a doubt be entertained as to the time to which the word surviving was meant to refer? Has he in the passage under consideration, where he has not said "other children" or "other surviving children" less plainly used a term of distinction between Isabella Howson, and others, his children—that distinction being, her death and their continuance in life?

The words "die without issue" have been agreed on all hands to mean "die without leaving issue," as they are here found. It has been contended that the word "and" immediately following the words "surviving children" may be read "or," and, this being done, that the word "surviving" would necessarily have to be construed as referring to the time of the testator's death. Whether such a consequence would follow I have not found it essential to consider, there not being, in my judgment, anything contained in the will which could be held to justify such a reading of the word

"and." Certainly it may sometimes mean "or," but here there is no ground for changing its ordinary sense.

The remaining question is, as to the construction of the words

TAYLOR BEVERLEY. [ 116 ]

"their legal personal representatives." It was suggested, I think by Mr. Rolt, that the word "their" might be read as referring to the testator's children generally, not merely to those whom he has called his "surviving children." But I cannot see any ground or place for such an argument. It was also contended, that the words "legal personal representatives" import in this will kindred or representation in blood, and are, therefore, words of purchase, not meaning merely representation in estate; a question, to the cases cited upon which, Corbyn v. French (1) may, perhaps, be added. How the matter might have stood had the word "personal" been omitted, I need not say; but the word "personal" is part of the passage as well as the word "legal." That it is impossible to suppose a will so worded, as that the expression "legal personal representatives" should mean "kindred" or representatives in

blood, I will not say; but certainly, it would require a context strongly and clearly denoting such an intention in order to justify a departure so wide from the proper meaning of the phrase.

a departure could not be justified by the mere circumstance that the words in their ordinary and proper sense are surplusage, as possibly they may be; and explanatory context there is none. follows, that, in my opinion, as Isabella Howson was the testator's last surviving child, the fund, of which she was tenant for life, has fallen into the residue. Harrison v. Foreman (2), Smither v. Willock (3), Browne v. Lord Kenyon (4), and Sturgess v. Pearson (5), authorities that I do not question, have no application to a bequest

[ \*117 ]

of the present description, to surviving children only. Much stress was laid in the argument upon the cases of Wilson The will construed in Wilson v. Bayly v. Bayly and Doe v. Prigg. differs from the will before me sufficiently \*to prevent that case, in my opinion, from governing the present in form or substance. The words of the material disposition in the will of Mark Tew having been "my daughters, Mary, Sarah, and Catherine, and the survivors and survivor of them and their assigns," the expression "as tenants in common" having been added, and in the parts of his will providing for the event of the death of his daughters, or

<sup>(1) 4</sup> R. R. 254 (4 Ves. 418).

<sup>(2) 5</sup> R. R. 28 (5 Ves. 207).

<sup>(3) 9</sup> Ves. 233. See 22 R. R, 127, n,

<sup>(4) 18</sup> R. R. 261 (3 Madd. 410). (5) 20 R. R. 316 (4 Madd. 411).

TAYLOR BEVERLEY.

any or either of them, before marriage, and bequeathing the residue of his estate, the testator having used the words "survivors" and "survivor" as he appears to have done. I cannot think that I am contradicting or contravening what the House of Lords did in that case by deciding as I deem it right to do in this. I have considered, also, the case of Doe v. Prigg with the attention and respect due to such an authority. But supposing it not to be substantially distinguishable from the present, a point on which I give no opinion, I am not prepared to follow it in this cause; conceiving, as I do, that it does not so absolutely bind the Court as to place me under the necessity of ascribing to the word "surviving," in the will before me, a sense contrary to my deliberate conviction. It may be observed, that it is not, as I read the report of Doe v. Prigg, to be collected from it whether William Jennings or John Warren was living when the will was made, or whether any child of either of them died in the testator's lifetime. But his wife was not, and it does not appear that his mother was, a child of William Jennings or of John Warren.

1844.

March 15, 18.

KNIGHT BRUCE, V.-C. [ 118 ]

### BATEMAN v. FOSTER.

(1 Coll. C. C. 118-127.)

A testator bequeathed one-fifth of his residuary personal estate to trustees upon trust for all and every the children or child of his son J. B., born and to be born, and who, being a son or sons, should live to attain twenty-one, or being a daughter or daughters, should live to attain that age or be married, to be equally divided between them, if more than one, share and share alike, as tenants in common; and he directed that the dividends, interest, and income, of the share or expectant share of each such child should be paid to his said son J. B., during his life, and after his decease, then during the minority of each such child should be retained by his said trustees or trustee, and be applied by him or them, as the event should happen, in, for, or towards the maintenance, clothing, and advancement, of each such child, in such proportion, manner, and form, as his said son J. B., or, as the event might happen, his said trustee or trustees, should think fit. At the date of the will and of the testator's death, J. B. had three children, one of whom, a son, afterwards attained twenty-one, married and lived separately from his father: Held, first, that a trust was constituted in J. B. of the income, for the maintenance, clothing, and advancement, of his children, which trust did not terminate upon all or any of his three children attaining majority in his lifetime; secondly, that J. B. was not entitled to apply the income arbitrarily, according to his own will and pleasure; thirdly, that he was entitled to apply the income of a child's prospective share towards that child's maintenance, clothing, and advancement, without reference to his ability to maintain and educate that child: and fourthly, that the son who had attained his majority was not entitled

to an immediate transfer of one-third of the fund, inasmuch as it did not appear that the testator intended to exclude after-born children, and at all events he did intend to authorize an unequal distribution from time to time of the income for the benefit of J. B.'s children.

BATEMAN v. Foster.

THOMAS BATEMAN, M.D., by his will, dated in 1829, after devising his real estate to his son George Bateman and Sir William Foster and their heirs upon trust for sale, and after directing that the produce of such sale should fall into and be considered as part of the residue of his personal estate, directed that his said trustees, whom he also appointed his executors, should stand possessed of the residue of his personal estate after payment of his debts and legacies, upon trust to divide the same into five equal shares, and to transfer one of such shares to his said son George Bateman, his executors, administrators, and assigns; and as to the other fourfifths, to invest the same upon any of the stocks or funds of Great Britain, or upon real securities, and to stand possessed of such funds and securities and the dividends, interest and annual produce thereof upon the trusts thereinafter mentioned, that is to say, (the testator then proceeded in these words:) "As, to, for and concerning one other full and equal fifth part or share of and in the said net produce of my said real and personal estate so to be invested as aforesaid, and the stocks, funds, and securities, to answer the same, and the dividends, interest and income thereof. upon trust for all \*and every the children or child of my said son James Bateman born and to be born, and who being a son or sons, shall live to attain the age of twenty-one years, or being a daughter or daughters, shall live to attain that age or be married, to be equally divided between them, if more than one, share and share alike, as tenants in common; and in case there shall be only one such child of my said son James Bateman, then the whole of the same part or share of the said trust-monies, stocks, funds, and securities, shall be in trust for that one child absolutely: and the dividends, interest, and income of the share or expectant share of each such child of and in the said trust-monies, stocks, funds, and securities, shall be paid to my said son James Bateman during his life, and after his decease, then, during the minority of each such child, be retained by my said trustees or trustee, and be applied by him or them, as the event shall happen, in, for, or towards the maintenance, clothing, and advancement, of each such child, in such proportion, manner, and form, as he my said son James Bateman, or as the event may happen, my said trustee or trustees,

[ \*119 ]

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[ \*120 ]

shall think fit. And I declare that the receipts of the said James Bateman shall from time to time be good and sufficient discharges for so much of the said dividends, interest, and income, as shall therein or thereby respectively be expressed to have been received."

The testator then bequeathed the remaining three-fifths of his residuary personal estate upon trust for his three daughters, named, in equal shares as tenants in common for their respective lives, for their separate use; and after their respective deaths, the share of each to be in trust for their respective children, to be equally divided between them, share and share alike, and to be vested interests in the sons at twenty-one, and in the daughters at twenty-one or marriage, with a direction that the income of the share of each of such grandchildren should be applied for or towards his or her maintenance, education, clothing, and \*advancement, during his or her minority in such manner and proportions as his said trustee or trustees should think fit. In default of children of the daughters, or in case of the death of such children (if any) before attaining vested interests, the testator bequeathed the lastmentioned three-fifths to George Bateman and the children of James in equal moieties, the latter taking subject to the same trusts as before.

The testator died in 1834, leaving the five children named in his will, and no others, surviving him. At the date of his will and of his death there were three children of James Bateman living, namely, a son and two daughters, and no other children of James Bateman had been born at the hearing of the cause.

The executors proved the will of the testator, paid his debts and legacies, and invested four equal fifth parts of the residue for the purpose of answering the trusts of the will. They also, until the eldest child of James Bateman came of age, paid the annual dividends or income of one of these fifth parts to James Bateman, for the purpose of being applied by him in the maintenance, clothing, and advancement of his children.

Thomas, the eldest child of James Bateman, having come of age, the present bill was filed by him, on behalf of himself and his two infant sisters, against the executors, and against James Bateman and others, praying, amongst other things, that it might be declared that the plaintiff Thomas was entitled to an immediate transfer and payment to him of a one-third part of one-fifth of the residue, and to all interest thereon since he attained his majority,

and that the remaining two-thirds of one-fifth might be secured for the benefit of his sisters.

BATEMAN v. FOSTER.

### Mr. Swanston and Mr. Haddan, for the plaintiffs:

• The receipt clause shows that it was not intended to give the father a beneficial interest; for, if he was tenant for life, it would not be required. [ 121 ]

(THE VICE-CHANCELLOR: The question is not so much, whether he was a trustee, as during what time the trust was to continue. If a child can say, "I will not be clothed or advanced, give me the money," there is no discretionary trust.)

The trust is determinable upon the eldest son attaining his majority, and he is then entitled to an immediate transfer of his share. [They cited Whitbread v. Lord St. John (1), Gilbert v. Boorman (2), Kilvington v. Gray (3), Titcomb v. Butler (4), and other cases on this point.]

Mr. Wigram and Mr. Rolt, for the defendant James Bateman:

[ 122 ]

There is no difficulty in giving the father a discretionary power to distribute the income of the fund during his life. \* The expressions of your Honour in Longmore v. Elcum (5) are peculiarly applicable to this case. Then, upon the terms of the will, full effect must be given to the words "proportion, manner, and form." \* No force can be given to the word "share" standing singly, unless it be held to mean the share of a child attaining twenty-one in the father's lifetime: Scott v. Earl of Scarborough (6), Brandon v. Aston (7).

Mr. Micklethwait, for the defendants, the executors.

### Mr. Swanston, in reply:

The words "share or expectant share" put it out of doubt that the testator distinguished between shares that were vested and shares that were not. The phrase establishes that the father, as trustee, was to deal with each share distributively. The share of a child \*ceases to be expectant and becomes vested when he attains twenty-one; and it is right that it should be so. It is important

[ \*123 ]

<sup>(1) 7</sup> R. R. 366 (10 Ves. 152).

<sup>(5) 60</sup> R. R. at p. 192 (2 Y. & C. C. C. 370).

<sup>(2) 8</sup> R. R. 137 (11 Ves. 238).

<sup>(3) 51</sup> R. R. 250 (10 Sim. 293).

<sup>(6) 49</sup> R. R. 317 (1 Beav. 154).

<sup>(4) 30</sup> R. R. 181 (3 Sim. 417).

<sup>(7) 60</sup> R. R. 11 (2 Y. & C. C. C. 30).

BATEMAN c. FOSTER.

[ \*124 ]

that the rights of parties should be ascertained as soon as possible. It is material that children should not be left in uncertainty as to their property during their whole lives. It is upon this principle that *Ellison* v. *Airey* (1) and a whole class of authorities, which have never yet been doubted, have been decided. \* \*

#### March 18. THE VICE-CHANCELLOR:

The point upon which my judgment was reserved in this case is concerning the construction to be put on the dispositions made by Dr. Bateman's will, as to one of the five shares into which he directed his residuary property to be divided, in these words. (His Honour here read the bequest as before stated.)

It was contended by the plaintiffs' counsel that the words "during the minority of each child" are properly referable, as well to the lifetime of Mr. James Bateman (who is still living), as to time after his decease, and that the words "during his life" ought to receive in construction a corresponding restriction. argument, however, I am unable to accede. To do so would be, without any necessity or reason arising either from the context of the instrument or from extrinsic circumstances, to disregard the correct as well as ordinary meaning of words-\*to depart from accurate as well as popular rules and habits of phraseology. expression "during his life" means clearly, I apprehend, a period which has not yet determined, though one of the children of Mr. James Bateman has attained majority, and which would not have determined, though (he still being alive) all his children now living were not only living, but also of full age.

It may here be observed that I have not to deal with such a state of circumstances as would have existed, if any one or more of the children living when the will was made, (as all the children now living were), or who afterwards came into existence, (as none did), had died, for there has been no such death.

The next question is, whether Mr. James Bateman was entitled to expend and apply the income of this fifth share, which has accrued since the death, in the year 1834, of the testator, at his own uncontrollable will and pleasure, for any purposes, or in any manner that he might think fit, whatever might be his conduct towards his children. I am of opinion, that he was not so entitled, nor do I consider that his counsel have contended for any such right on his part. The same observation will, of course, apply to

the future income of the share during the joint lives of himself and all or either of his three children.

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But was he entitled, during the minority of his son, the only child now of age, to apply the income of the son's presumptive portion in or towards the son's maintenance, clothing, and advancement, or either of those purposes, without reference to his own ability, and whether of ability or not of ability, to maintain and educate the son from his own resources without assistance? I am of opinion, that, according to the true construction of the will, Mr. James Bateman was so entitled, and that a benefit, to that extent at least, was intended to be given to him. Such a purpose being, as in my opinion it is, expressed with sufficient plainness, I am bound to give effect to it. The same observation \*applies, of course, to each of the daughters severally, as to their presumptive portions to the present time.

[ \*125 ]

It has in effect been admitted on all hands, that he properly maintained and educated and did his duty towards the son up to his majority, and has properly maintained and educated and done his duty towards the daughters to the present time. An inquiry in any such respect not being asked, I do not think it necessary to direct any.

The total amount of the capital of the fifth share being, as I collect, under 5,000l., the family being in the condition of life in which they appear to be, the three children having been born respectively in December, 1821, February, 1826, and August, 1827, the testator's death having happened in 1834, and my opinion as to the power of unequal distribution, being what I shall presently state it to be, I think that I may safely venture to accede to what I understand to be desired by the counsel for all the parties, namely, to the allowance to Mr. James Bateman of the whole income upon this share hitherto accrued; the payments since the son's majority having, as I am informed by the Bar, been made upon the joint receipts of the father and son. I may observe, however, in passing, that, from what has been stated at the Bar, consider it to be highly probable, and in effect admitted, that Mr. James Bateman has not been and is not of ability, from his own resources, to maintain and educate his children, as that phrase has long been practically understood in this Court. This is plainly not doubted by any party.

The father continuing to perform his duty towards his daughters, as I understand him hitherto to have performed it, will, in my

BATEMAN r. FOSTER, judgment, (as follows from what I have said), be entitled, as to the elder daughter's presumptive portion, until his own death, or her death, majority, or marriage, and as to the younger daughter's presumptive portion, until his or her death or her majority or marriage, to receive and expend the income of those portions respectively.

[ 126 ]

Then comes the question raised on the part of the son, whether, being of age, he is entitled now to demand payment to himself of one-third of the capital of the share in question, or to be let at least into the personal receipt and personal expenditure of its income. I am of opinion that the former branch of this question must be answered in the negative. It may be true that the answer must have been different had the dispositions made concerning this fifth share stopped at the word "absolutely." But taking the whole will together, and considering especially the provisions made as to maintenance, clothing, and advancement, to which I have been particularly referring, my impression of the true construction of this instrument is, that a child of Mr. James Bateman hereafter coming into existence, whether before or after the majority of the youngest of the present children, was not intended to be, and is not, excluded necessarily from participation in the fifth share in question. Whether, however, that impression is correct or erroneous, I think, notwithstanding the testator's use, more than once, of the word "each," as he has used it, that the expression "in such proportions, manner, and form," coupled with the context, shows that the testator meant to authorise an unequal distribution, from time to time, for the benefit of Mr. James Bateman's children, of the income directed to be paid to him, and be applied by him in or towards maintenance, clothing, and advance; so that, for instance, in the present year, an application of the present year's income in the proportion of five-sixths for the daughters, and one-sixth for the son, might, if fair and reasonable under existing circumstances, be justifiable.

If I am right in this view of the will, the son cannot now be let into the personal receipt and personal expenditure of the income of one-third of the fifth share in question. But the whole of the income must be paid until the death of Mr. James Bateman, or either of his three children, \*or until further order, to Mr. James Bateman; he undertaking duly and properly to apply it in, for, or towards the maintenance and advancement or the maintenance of the three plaintiffs, in such proportions, manner and form as he shall reasonably and fairly think fit.

[ \*127 ]

What I should have done, or shall do, if Mr. James Bateman had committed, or shall commit, any breach of trust or of duty towards either of his children it is unnecessary to say. Such a case has not arisen; I hope that it will not arise, and I do not expect that it will. It has been stated and admitted at the Bar, that though the son, being married, does not live with the father, they are on perfectly good terms together, that they are mutually satisfied with each other's conduct past and present, that the son has been placed in an office or employment producing him some income which he now holds, and that he also receives, and ever since his majority has received, a certain allowance from the father.

Nor do I say what, if any, will be the effect of death, bankruptcy, insolvency, or an assignment, on the part of either of the plaintiffs, or the marriage of either of the daughters. On these points, I entirely reserve myself.

# BREE v. PERFECT (1).

(1 Coll. C. C. 128—130; S. C. 8 Jur. 282.)

A testatrix bequeathed 3,000*l*. to trustees upon trust to pay the interest to B. for life; and after the decease of B. the testatrix willed that the said 3,000*l*. should be equally divided among such of B.'s children as should be living at the time of her death, as they respectively attained the age of twenty-one; but her will was that if B. should die without leaving issue, then the 3,000*l*. should be paid to C.: Held, that the children of B. took vested interests in the 3,000*l*. at her death, and consequently that the share of one who died after B., under the age of twenty-one, devolved to her father as her administrator.

Anne Robinson, by her will, dated the 28th January, 1835, gave to her executors William Perfect and J. C. Perfect the sum of 3,000l., upon trust to place the same out at interest and pay such interest as they might make to her niece Frances Bree, the wife of the Rev. R. S. Bree, for her sole and separate use during her life; "and at the death of my said niece Frances Bree, I will that the said principal sum of 3,000l. shall be equally divided among such of her children as shall be living at the time of her death, as they respectively attain the age of twenty-one; but my will is, that, if my said niece Frances Bree shall die without leaving issue lawfully begotten, then the interest of the said sum of 3,000l. shall be paid to my sister Catherine Maria Perfect during her life, and at her

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<sup>(1)</sup> In re Bevan's Trusts (1887) 34 Ch. D. 716, 56 L. J. Ch. 652, 56 L. T. 277.

R.R.

Bree c. Perfect. death the said 3,000% shall be equally divided among the children of the said C. M. Perfect."

The testatrix died in 1837. Frances Bree died in April, 1838, leaving four children only, the eldest of whom was born in July, 1829.

By an order of the Court of Exchequer, dated the 20th February, 1839, and made in this cause, in which the infant children of Mrs. Bree were sole plaintiffs, and the executors of the testatrix sole defendants, it was ordered, that the executors should transfer into Court, to the account of the infant legatees, a sum of stock which had been set apart to answer the legacy of 3,000*l*.; and it was referred to the Master to inquire and state to the Court what children of Mrs. Bree were living at her death, when they were respectively born, whether any, and which, had died since Mrs. Bree's death, and if any had so died, who was or were the legal personal representatives of the children so dying.

[ \*129 ]

After the date of this order, Jessie Matilda Bree, one of \*the children, died, under twenty-one; whereupon her father took out letters of administration of her estate, and, as such administrator, now presented his petition, praying that one fourth part of the stock in Court, being his deceased daughter's share therein, might be transferred to him.

Mr. James Parker, for the petitioner, observed, that, from the wording of the order of the Court of Exchequer, that Court must have considered that the interest of the children became vested immediately on the death of their mother, and he contended that such was the right construction.

## Mr. G. A. Young, for the surviving children:

The word "divided" is the only word of bequest, and the division is evidently intended to take place upon the children attaining twenty-one, and not at the death of the tenant for life; and even if this be doubtful, the Court will lean to a division at twenty-one: Perfect v. Lord Curzon (1), Torres v. Franco (2), Mocatta v. Lindo (3). The share, therefore, did not vest in the deceased child, but goes on to the survivors. There is no gift here of the interim interest to the children. The case comes rather within the distinction taken by Sir John Leach in Vaudry v. Geddes (4) and Jones v.

<sup>(1) 21</sup> R. R. 331 (5 Madd. 442). (3) 47 R. R. 186 (9 Sim. 56).

<sup>(2) 32</sup> R. R. 308 (1 Russ. & My. (4) 52 R. R. 196 (1 Russ. & My. 649).

Mackilwain (1). He also referred to Hanson v. Graham (2), Newman v. Neuman (3), and Fonnereau v. Fonnereau (4).

BREE Ø. PERFECT.

#### THE VICE-CHANCELLOR:

I think it probable that the existing state of things never occurred to the mind of the testatrix. I think it also probable. that, if it had occurred to her, she would have solved the question in favour of the \*surviving children. The Court, however, must be governed by the words. It seems to me that the Court of Exchequer must, in effect, have decided in favour of the vesting. Independently, however, of that circumstance, which is entitled to attention, I think, taking the whole disposition together, and especially considering that the limitation over is upon the niece dying without leaving issue, that the true construction of the will is, that the shares did vest in the children on the death of the tenant for life, and that the father must take the share of the deceased child.

[ \*130 ]

### BAGGETT v. MEUX.

(1 Coll. C. C. 138-153; S. C. 13 L. J. Ch. 228; 8 Jur. 391; affd. 1 Ph. 627; 15 L. J. Ch. 262; 10 Jur. 213.)

1844. March 19, 29, [ 138 ]

[AFFIRMED on appeal as reported in 1 Phillips, p. 627, 65 R. R. p. 71.]

## JONES v. WILLIAMS (5).

(1 Coll. C. C. 156-161; S. C. 8 Jur. 373.)

Upon the construction of a will: Held, that the effect of general words BRUCE, V.-C. of charge at the commencement was not cut down by subsequent words.

1844. March 21.

[ 156 ]

THOMAS JONES, by his will, dated the 18th September, 1816, directed all such debts as should be due and owing by him to any person or persons whomsoever, by specialty or simple contract, or otherwise howsoever, at the time of his decease, as also his funeral expenses and the expenses of proving his will, to be paid; and, in aid thereof, he directed that the money arising and to be paid for

- (1) 25 R. R. 32 (1 Russ. 225).
- (2) 5 R. R. 277 (6 Ves. 239).
- (3) 51 R. R. 206 (10 Sim. 51).
- (4) 3 Atk. 645.
- (5) In Corser v. Cartwright (1873) L. R. 8 Ch. 970, where a general implied charge of debts on real estate

was followed by an express charge of debts upon a particular estate devised to one of the executors, it was held that the express charge controlled the implied charge so far as the particular estate was concerned.-O. A. S.

Jones t. Williams.

[ \*157 ]

the purchase of the premises called Caerallt, otherwise Brynhyfryd, in the parish of Llanbeblig, in the county of Carnarvon, which he had lately sold to the Governors of Queen Anne's Bounty, and also the principal and interest due to him from the late Joseph Williams of Glanrafon, in the said county of Carnarvon, Esq., deceased, should be applied for that purpose. And he thereby devised unto his wife Sydney Jones, her heirs and assigns for ever, his messuage or dwelling-house, with the lands, hereditaments, and premises thereto belonging, in the parish of Llanbeblig, called Tyny Gorse, in the occupation of Owen David, in trust to sell for the most money that should be reasonably gotten for the same, and to apply the money arising \*by such sale in further aid and discharge of his said debts. And the testator also gave and devised unto his said wife and her assigns his messuage or tenement, lands, hereditaments, and premises, with the appurtenances, situate in the parish of Llanbeblig, called Castellmai, to hold to his said wife and her assigns for her life without impeachment of waste, subject, however, to the mortgage for securing the re-payment of 500l. and interest affecting the same; and after her decease, he devised the same, subject as aforesaid, unto his daughter Anne Jones, her heirs and assigns. The testator then devised certain leasehold messuages in the town of Carnarvon and parish of Llanbeblig, as to one moiety, to his wife for life, and, as to the residue, to his daughter Anne, her heirs, executors, administrators, and assigns. He also devised an estate at Llangollen to his daughter, her heirs and assigns: and he bequeathed to her absolutely certain leasehold property in the town of Llanrwst. He then bequeathed certain specific monies and certain plate to his wife; and after giving to his daughter for her life a silver tankard and two silver goblets, which were presented to him by the Carnarvonshire Agriculture Society, and directing, after her decease, that the same should remain at Castellmai as heir-looms, he gave the remainder of his And he bequeathed the residue of his plate to his daughter. personal estate to his wife and daughter in certain proportions.

Upon the death of the testator, a bill was filed in the Chancery Court of the Great Sessions for the several counties of Anglesey, Carnarvon, and Merioneth, by Jane Jones, a specialty creditor, and Palfrey Rowlands, a simple contract creditor of the testator, on behalf of themselves and all other the creditors, for the administration of the testator's assets. By the decree made on the hearing of the cause in that Court, it was referred to the Master to take the

usual accounts of the testator's debts, and it was ordered that the testator's personal estate not specifically bequeathed \*should be applied to pay the plaintiff and all others, the testator's creditors, in a course of administration, and then to pay his funeral expenses; and in case the testator's personal estate should not be sufficient for that purpose, it was declared that the testator's messuage called Tyny Gorse, devised by his will to Sydney Jones and her heirs, to be sold for the payment of his debts, ought to be sold for that purpose: [and after some directions consequent upon that declaration the decree directed that] in case the aforesaid several funds should not be sufficient for the payment of the testator's debts, the real estates devised by his will to the devisees therein named should be subject, in proportion, towards further satisfaction of his debts which affected the same. And it was ordered, that the same. or so much thereof as should be sufficient for the payment of the said debts which affected the same, should be sold accordingly, &c. And the registrar was to settle the proportions to be borne between the respective devisees of such estates; and out of the money arising by such sale, the said testator's debts affecting the said lastmentioned estates were to be paid. And if all such several funds should still be insufficient for the payment of the said testator's debts, the registrar was to take an account \*of the rents and profits of the said last-mentioned estates received by said defendants, or any or either of them, &c., and charge the said defendants therewith, and apply the same towards satisfaction of such aforesaid debts affecting the said last-mentioned estates as should so remain unpaid.

JONES
r.
WILLIAMS.
[\*158]

[ \*159 ]

The cause now came on for hearing for further directions, and one of the questions was, whether the testator had charged all his real estates with the payment of his debts.

Mr. Temple and Mr. Renshaw, for the plaintiffs.

Mr. Simpkinson and Mr. Cockerell, for another creditor of the testator.

Mr. Russell and Mr. Cankrien, for the testator's daughter and her husband, contended, first, that the Castellmai estate was not charged by the will with the payment of the testator's debts; for that the general charge at the beginning of the will was cut down by the subsequent expressions; from which it appeared that only certain specified real estates were to be applied "in aid" of the

Jones v. Williams. personalty for \*that purpose: Douce v. Lady Torrington (1), Thomas v. Britnell (2), Palmer v. Graves (3); all which cases were recognized and approved by Lord Lyndhurst in Price v. North (4). Secondly, that, whatever might be the true construction of the will, the expressions "affect the same" and "affecting the said lastmentioned estates," which were used in the decree in reference to the devised estates, showed that the Court of Great Sessions considered that there were some debts which did not affect the devised estates; and the decree in that respect, not having been appealed from, must stand.

In the course of the argument the Vice-Chancellor referred to Graves v. Graves (5) and Cornewall v. Cornewall (6).

#### THE VICE-CHANCELLOR:

Upon the question of construction, without expressing or intimating either assent or dissent as to the cases of *Douce* v. Lady Torrington and Palmer v. Graves, I am of opinion, upon this will, that there is at the commencement of it, plainly expressed, an intention to charge all the property with all the debts, and that the following parts of the will do not contain any sufficient indication of a contrary intention; and, therefore, according to the true construction, whatever might be the order of precedence in which the testator considered the property chargeable, all the property is charged. The doubt, however, which presses upon my mind is, whether I can give effect to this construction consistently with those expressions in the decree to which my attention has been called. Upon that I will hear the plaintiffs' counsel.

### Mr. Temple:

[\*161] The expressions in question have reference, \*no doubt, to mortgage and specialty debts, those debts at law affecting the realty; but the effect of them is not to exclude the operation of the general charge, at the commencement of the will, upon the residue of the real property which may be left after payment of the mortgages and specialty debts.

#### THE VICE-CHANCELLOR:

If the cause had been originally before me, I should have dealt

- (1) 39 R. R. 308 (2 My. & K. 600).
- (4) 65 R. R. 341 (1 Phillips, 87).

(2) 2 Ves. Sen. 313.

- (5) 42 R. R. 92 (8 Sim. 43).
- (3) 44 R. R. 110 (1 Keen, 545).
- (6) 56 R. R. 61 (12 Sim. 298).

with the will in this case as the will in Graves v. Graves was I regret to say, however, that I find myself unable to surmount the language of the decree, especially the last words. All I can do is, not to carry the declarations contained in it further.

JONES WILLIAMS

### MOSTYN v. MOSTYN (1).

(1 Coll. C. C. 161—168; S. C. 8 Jur. 456.)

Knight [ 161 ]

1844. March 21.

By the marriage settlement of A. and B., a sum of 3,300l. was assigned BRUCE, V.-C. to trustees upon trust for the husband and wife for their respective lives; and after the decease of the survivor of them, in case there should be any child or children of their bodies then living, to pay the said sum unto such child or children which should be then living, in such shares &c. as the husband and wife should jointly appoint; and for want of such appointment, the same was to go and be equally divided among such children, if more than one, as should not be inheritable to the real estate of the husband, share and share alike, and to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which should first happen; and in case there should be no such child or children living at the time of the death of the survivor of A. and B., or, if such, and they should all happen to die before their respective ages of twenty-one years or days of marriage as aforesaid, then the said sum was to go to such person or persons as B. by deed or will should appoint. A. and B. died without executing the joint power of appointment, having had several children, some of whom survived them: Held, that a son of the marriage who attained twenty-one, but died, without having been married, in the lifetime of one of his parents, acquired a vested interest in the fund, but that two children who died infants and without having been married, in their parents' lifetime, were excluded from the fund.

By the settlement made previous to the marriage of Samuel Mostyn and Jane Thomas, dated the 9th June, 1789, the sum of 3,300l., being the fortune of the wife, was assigned to Paul Panton and Thomas Crew, their executors, &c., upon trust, after the solemnisation of the marriage, to pay the interest and produce thereof to the husband for his life; and from and after his decease, to the wife for her life; and then the settlement proceeded in these words: "And \*from and after the decease of the survivor of them the said S. Mostvn and Jane his intended wife in case there shall be any child or children of their bodies between them begotten then living, then upon further trust that they the said Paul Panton and Thomas Crew, and the survivor of them, and the executors, administrators, or assigns of such survivor, shall pay, apply, and dispose of the said principal sum of 3,300l., and the interest or produce that may be had or made thereof, unto and

[ \*162 ]

<sup>(1)</sup> Jeyes v. Savage (1875) L. R. 10 Ch. 555, 44 L. J. Ch. 706, 33 L. T. 139.

Mostyn e. Mostyn. among such child or children which shall be then living, in such parts, shares, and proportions, and upon such conditions, manner, and form, as they the said Samuel Mostyn and Jane Thomas, by any their joint deed or deeds in writing, to be by both of them duly executed and attested in the presence of two or more credible witnesses, shall give, direct, limit, or appoint the same; and for want of such gift, limitation, and appointment, that the same shall go to and be equally divided among such children, if more than one, of the said Samuel Mostyn and Jane his intended wife, as shall not be inheritable to the real estate of the said Samuel Mostvn hereby agreed to be settled in manner herein mentioned, share and share alike, and to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which shall first happen; and in case there shall be no such child or children living at the time of the death of the survivor of them the said S. Mostyn and Jane his intended wife, or, if such, and they shall all happen to die before their respective ages of twentyone years or days of marriage as aforesaid, then and in such case upon further trust to transfer and assign, as well the said principal sum of 3,300l. as all securities as shall be then taken for the same, to such person or persons, and to and for such uses, trusts, intents, and purposes, and under such conditions, as she the said Jane Thomas, notwithstanding her said intended coverture, and as if she were a feme sole, shall, by such her deed in writing, or last will \*and testament to be by her so executed and attested in manner aforesaid, give, dispose, direct, limit, and appoint the same." default of such last-mentioned appointment, the fund was to go to certain persons named, who were the collateral relatives of Mrs. Mostyn.

[ \*163 ]

The indenture then contained a covenant on the part of the husband for settling various real estates in Flintshire, of which he was seised in tail and in fee, upon himself for life, with certain provisions for his wife, with remainder to his issue in tail, with remainder to himself in fee, in the usual way of settling estates in that neighbourhood, with a power to the trustees to apply the 3,300l. in paying off incumbrances and to pay the surplus to the husband, taking securities on the estates for the sums so paid.

The marriage took effect, and there were seven children of the marriage, of whom four, namely, Robert John, Mary Margaret, Samuel Johnson, and Thomas, attained the age of twenty-one, and were living at the hearing of this cause: one, namely, John Henry,

attained the age of twenty-one, but died intestate, without having been married, in the lifetime of his mother: and the other two, namely, Jane and Margaret, died infants, and without having been married, in the lifetime of both their parents. Mostyn c. Mostyn.

Mr. and Mrs. Mostyn never executed the joint power of appointment of the 3,300l. given to them by the settlement, and they died, the former in November, 1819, and the latter in April, 1836.

Under an indenture dated the 5th July, 1816, made in pursuance of the settlement, Robert John Mostyn became first tenant in tail of the settled real estates. By the same indenture those estates became charged with part of the sum of 3,300l. which had been advanced by the trustees for the payment of incumbrances, and certain terms of years were assigned to the trustees for securing the re-payment of those sums.

[ \*164 ]

The bill was filed by Thomas Mostyn against Robert \*John Mostyn, the trustees of the 3,300l., and certain persons alleged to be subsequent incumbrancers on the real estates, charging that the 3,300l. was divisible equally amongst the three younger children of Mr. and Mrs. Mostyn, who survived their parents, that two of these children had received their shares, and that the plaintiff, as the other of these children, ought to be paid the remaining share.

The question upon the hearing of the cause for further directions was, whether the plaintiff's construction of the settlement was right, or whether, in the events that had happened, John Henry, or the deceased infants, took any interest under it in the 3,800l. The plaintiff had taken out letters of administration of the effects of John Henry, but no administration had been granted in respect of the infants, and they were consequently unrepresented in the cause.

Mr. Russell and Mr. Terrell, for the plaintiff, contended, that the joint power of appointment, given to the husband and wife by the settlement, only extended to younger children living at the death of the surviving parent, and that the limitation over in default of appointment only included the same children; consequently, that John Henry Mostyn and the deceased infants took no interest in the fund in question. They referred to Woodcock v. Duke of Dorset (1), Hope v. Lord Clifden (2), and the observations of Sir Thomas Plumbe in Howgrave v. Cartier (3).

<sup>(1) 3</sup> Br. C. C. 569; see 13 R. R. (3) 13 R. R. 142, see p. 147 (3 V. 145, π. & B. 79, see p. 85).

<sup>(2) 5</sup> R. R. 364 (6 Ves. 499).

Mostyn e. Mostyn.

[ \*166 ]

Mr. Wigram and Mr. Heberden, for the defendant Robert John Mostyn.

Mr. T. H. Hall, for the defendants the trustees.

[\*165] It was noticed during the argument that there were no \*representatives of the deceased infants before the Court, but no objection was taken on that ground.

#### THE VICE-CHANCELLOR:

The Court must read settlements of this description with an inclination to believe that there was an intention to provide for children at a time when a provision would be required, namely, at If the expressions are doubtful, that twenty-one, or marriage. inclination will prevail; but if there be a clearly expressed intention, that intention, so clearly expressed, must be abided by. I have always understood to be the doctrine on this particular Now in this case the 3.300l. is to be for the husband and wife for their lives respectively, and afterwards to be paid "unto and among such child or children,"—it is not even said of the marriage, but that cannot be doubted,-"which shall be then living, in such parts, shares, and proportions, and upon such conditions, manner, and form, as they the said Samuel Mostyn and Jane Thomas, by any their joint deed or deeds in writing, to be by both of them duly executed and attested in the presence of two or more credible witnesses, shall give, direct, limit, or appoint the Therefore the husband and wife could not appoint to any child except a child fulfilling the condition of survivorship, according to the ordinary meaning of the words used. "And for want of such gift, limitation, and appointment," which is the event that has happened, "the same shall go to and be equally divided among such children, if more than one, of the said Samuel Mostyn and Jane his intended wife, as shall not be inheritable to the real estate." Now, in strict construction, according to all propriety of phraseology, the "such" and the "as," here, are the two words connected together; the "such" is not connected with any previous word. Admitting that it would have been connected with the previous description or designation, if nothing had followed, here it is followed by a word to \*which alone, and to nothing that has gone before, it strictly and properly, according to the right use of language, belongs. If the intention required it, correct rules of

phraseology might be departed from; but I am here asked to depart

e. Mostyn.

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from those rules, for the purpose of contradicting that which it ought to be the inclination of the Court to believe was intended, and therefore I do not think myself warranted in not reading the words as used according to the correct rules of language. Reading the word "such" as I have read it, and as in point of correct writing it ought to be read, there is no condition of survivorship in default of appointment at all. The fund in question is to go to all the children not inheritable. Then, after a provision as to minority and marriage, that I shall notice presently, comes the provision, "that, in case there shall be no such child or children living at the time of the death of the survivor of them the said Samuel Mostyn and Jane his intended wife,"—which has not happened,— "or, if such,"—which has happened,—" and they shall all happen to die before" twenty-one or marriage, --which has not happened, --"then and in such case upon further trust to transfer and assign, as well the said 3,300l. as all securities as shall be then taken for the same, to such person or persons, and to and for such uses, trusts, intents and purposes, and under such conditions, as she the said Jane Thomas, notwithstanding her intended coverture, and as if she were a feme sole, shall, by such her deed in writing, or last will and testament, to be by her so executed and testified in manner aforesaid, give, dispose, direct, limit, and appoint the same,"and there the Master stops: but the ulterior trusts, in default of appointment by Jane Thomas, are for collateral relatives, as I read the settlement; and therefore, if this settlement receives the interpretation that a child could not take a vested interest unless surviving the parents, there being no appointment, and no child had been living at the death of the survivor, although there \*had been twenty grandchildren, the property would go over to collaterals. We need not, however, closely consider what would have been the case under such circumstances, because the circumstances have not happened. I am of opinion, according to the rules applied to such a subject in all the cases now considered as of binding authority, in whatever way the fund would have gone if no child had survived the parents, that, as several children have survived the parents and attained majority, a child attaining majority, but not surviving both parents, did acquire a vested interest in a share. The next question, then, is, what share?

The trust is for the children, but to be paid at twenty-one, or marriage, which word "marriage," be it observed, applies to sons as well as daughters; and, therefore, a son marrying under twenty-one [ \*167 ]

Mostyn c. Mostyn. would, as to vesting, stand on the same footing as a son attaining twenty-one, which, like many other parts of this settlement, The words may or may not import a vesting on is not usual. birth, according to circumstances. You must look at the rest of the settlement, to see whether they import mere payment or vesting. I find in a subsequent part of the settlement, and in fact very near these words, --forming almost part of the same clause, -this declaration: "that, in case there shall be no such child or children living at the time of the death of the survivor of them the said Samuel Mostyn and Jane his intended wife, or, if such, and they shall all happen to die before their respective ages of twenty-one years or days of marriage," the fund is to go over. I think that this may be fairly taken as a sufficient indication of intention that the age of twenty-one or marriage was to be the period of vesting. Therefore, I think that the two children who died minors (living their parents), without having married, did not acquire vested interests, and I am not disposed to insist upon the presence of their representatives.

[At the request of the trustees' counsel the case stood over to make the infants' representatives parties.]

July 17.

The cause afterwards came on for re-argument, and was re-argued in the presence of the representatives of the two infants, on whose behalf  $Mr.\ Wigram$  and  $Mr.\ Heberden$  addressed the Court.

The Vice-Chancellor said, that he adhered to the opinion before expressed by him as to the construction of the settlement; but if that opinion was erroneous, there was, he thought, but one other reasonably possible view of the instrument—a view which would equally exclude the children who died infants and without having been married during the joint lives of the two parents. As to the other deceased child's share, the parties were agreed.

1844. May 4, 8.

## NELTHORPE v. HOLGATE (1).

(1 Coll. C. C. 203—223; S. C. 8 Jur. 551.)

KNIGHT BRUCE, V.-C.

A. contracted to purchase an estate of B., being at the same time under a secret verbal understanding with C. to sell the estate to him; and a written contract was afterwards entered into between A. and C. for the sale of the estate to C. upon the same terms on which A. had purchased from B. Held, that a bill for specific performance was maintainable by A. and C.

(1) Ashburner v. Sewell [1891] 8 Ch. 405, 60 L. J. Ch. 784, 65 L. T. 524.

against B.; and the price being adequate, and it not being suggested by B. that he had ever refused, or was unwilling, or would have objected to treat with C., or might have obtained better terms from him, had he known the real circumstances of the case, the Court decreed specific performance against him.

NELTHORPE v. Holgate.

If a defendant cannot object to a party being made a co-defendant, he cannot object to his being made a co-plaintiff, if the interests of the several co-plaintiffs are not conflicting.

A person, seised in fee of an estate subject to the life-interest therein of his mother, and having knowledge of his mother's interest, contracted to sell the estate to a party who had no actual knowledge of her interest, but knew, or might have known, that she resided on the property as tenant or occupier: Held, that, although the mother's residence might, as between her and the purchaser, have carried constructive notice of her rights, it was not necessarily notice as between the vendor and purchaser (in those respective characters), so as to deprive the purchaser of his right to compensation in respect of the life-interest.

A vendor contracted to sell an estate in fee, with a stipulation, that if any dispute should arise as to the title, the same should be submitted to some eminent conveyancer, and that in case he should be of opinion that a good title could not be made, the contract should be rescinded. Upon the delivery of the abstract, it appeared that the vendor's mother had a life interest in the premises, and that her interest was known to the vendor at the time of the contract. Upon her refusing to join in the conveyance to the purchaser: Held, that the vendor was not entitled to rely on the before-mentioned stipulation as a ground for rescinding the contract, but that the contract must be specifically performed, with compensation in respect of the life-interest.

The original bill was filed by Sir John Nelthorpe, Bart., and Lawson Holmes, against Edward and Sarah Holgate, for the purpose of enforcing the specific performance of a \*contract for the sale of an estate to the plaintiffs, or one of them, under the following circumstances:

「\*204 T

Edward Holgate, being seised in fee, subject to the life interest therein of his mother, Sarah Holgate, of a certain freehold messuage and lands situate at Sturton, in the parish of Scawby, in the county of Lincoln, upon which he and his mother had resided since 1816, agreed in March, 1841, with Lawson Holmes, for the sale of the premises to him at the price of 6,000*l*., and thereupon an agreement [was signed by the parties, containing the following clause:]

"The purchase to be completed on the 6th day of April, 1842, when the purchaser is to have possession of all the said premises, except the messuage or tenement and garden, of which the purchaser is to enter into possession on the 18th day of May, 1842. The said Edward Holgate, at his own expense, to make out a good title to the said estate, and the purchaser to be at the expense of his own conveyance. And it is hereby agreed and declared, that if any dispute shall arise as to the title, the same shall be submitted to

T. HOLGATE.

[ \*205 ]

NELTHORPE some eminent conveyancer, to be agreed upon by both parties; such objections to be stated in writing, within six months of this date, to Mr. Robert Owston, the solicitor to the vendor: and in case he shall be of opinion that a good title cannot be made out, \*subject as aforesaid, that then either of the said parties hereto shall be at liberty to rescind the contract on two calendar months'

notice after the opinion of counsel shall be obtained."

In July of the same year, Holmes agreed with Sir John Nelthorpe, who possessed property in the same parish, for the sale to him of the premises upon the same terms and conditions under which Holmes had contracted to purchase them. This agreement was reduced into writing and dated the 24th July, 1841, and was signed by Holmes, of the one part, and Henry Grantham, as agent for Sir John Nelthorpe, of the other part.

On the 29th July, the defendant Edward Holgate, by his solicitors, caused an abstract of title of the premises to be delivered to Nicholson and Hett, the solicitors of Holmes, who were also the solicitors of Sir John Nelthorpe.

It appearing by the abstract that Sarah Holgate had a life-interest in the premises, Nicholson and Hett, upon returning the abstract, required that the tenant for life should join in the conveyance, or release the estate. An answer was returned by Holgate's solicitor, dated the 18th December, 1841, stating the refusal of Mrs. Holgate to accede to this requisition.

A correspondence then ensued between the solicitors on both sides; the defendant's solicitors insisting that the objection on the part of the tenant for life to join in the conveyance was an unforeseen difficulty as to title, and that \*as such it came within the operation of that clause of the agreement of March, 1841, , relating to disputes as to title; and they suggested that, if necessary, the point should be referred to a conveyancer, under the terms of that clause. On the other hand, the plaintiffs' solicitors insisted that their clients were entitled to specific performance, with compensation in respect of Mrs. Holgate's life interest.

The original bill [which] was filed on the 19th July, 1842, prayed that the defendant Edward Holgate might be decreed specifically to perform the agreement of the 29th March, 1841, to make a good title, and, if necessary, to procure Mrs. Holgate to join; and that, if necessary, she might be decreed to join in the conveyance, the plaintiff Nelthorpe being ready, upon having a good title, having a conveyance made to him, and being let into

[ \*206 ]

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possession, to pay the 6,000l., &c. But if the Court should be of Nelthorpe opinion that Mrs. Holgate could not be compelled to join, then, that the plaintiffs might be declared entitled to the benefit of their agreement to the extent of Edward Holgate's interest, and that a proper abatement might be made in the purchase-money in respect of the interest of Mrs. Holgate, the plaintiff Nelthorpe being ready to pay the balance &c.

HOLGATE.

The defendant Edward Holgate, by his answer, alleged . \* that he has discovered that the said Sir John Nelthorpe, being desirous of possessing the defendant's said property, the said plaintiff, Lawson Holmes, was employed by, or on behalf of, the said plaintiff Sir John Nelthorpe, \*through the secret instrumentality of the said Henry Grantham, to endeavour to purchase the same nominally for himself, but in reality for and on behalf of the said Sir John Nelthorpe; \* \* and he insisted on his right to rescind the contract on the ground of the unforeseen difficulty of title, not being aware, at the time of the original transaction, that his mother would not join in the conveyance. He submitted, that the institution of the suit by the plaintiffs was premature and vexatious, and that the bill ought to be dismissed with costs.

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After this answer had been filed, the plaintiff Holmes died: whereupon such further proceedings were had as are mentioned in the judgment in this case.

The cause now came on for hearing.

It appeared from the plaintiffs' evidence, that the defendant Edward Holgate had, ever since the death of his father, lived with his mother on the farm, and that they had for some years jointly conducted it, though latterly it had principally been managed by Edward Holgate.

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With respect to the question of Holmes's agency, Grantham, \*in his examination for the plaintiff, stated that he, as agent of Sir John Nelthorpe, advised him to purchase the property, and requested Holmes to do so on Sir John Nelthorpe's behalf. This deponent also stated, that he never knew, until after the 24th July, 1841. that Mrs. Holgate had a life-interest in the premises, but up to that time believed that Edward Holgate was absolute owner. On his cross-examination, he stated his belief, that Holmes purchased bona fide for himself, with an understanding that Sir John Nelthorpe should afterwards purchase of him.

On the part of the defendant, evidence was entered into for the purpose of showing that it was matter of notoriety in the

NELTHORPE neighbourhood, from the circumstance of her residence on, and management of, the farm, that Sarah Holgate had a life-interest in the premises. The evidence, however, on this point was conflicting.

Mr. Wigram and Mr. Heathfield, for the plaintiff, [relied on Tanner v. Smith (1), Fellowes v. Lord Gwydyr (2), Mortlock v. Buller (3), Wood v. Griffith (4), and other cases, and distinguished the present case from Thomas v. Dering (5)].

- [211] Mr. Russell and Mr. Rogers, for the defendant Edward Holgate:
  - \* The tenant for life refusing to concur in the sale, the defendant cannot make a good title, and the plaintiff cannot insist on specific performance, with compensation: Williams v. Edwards (6), Collier v. Jenkins (7), Wheatley v. Slade (8). If Holmes was a purchaser on his own account, there was a misjoinder of plaintiffs in this suit, inasmuch as, in general, the only proper parties to a bill for specific performance are those who sign the contract: Tasker v. Small (9).

(THE VICE-CHANCELLOR: That case seems to have little or no application to the present.)

[\*212] If A. contracts to \*sell to B., and then contracts to sell to C., it is improper to make both purchasers parties to a bill for the specific performance of either of the contracts: Cutts v. Thodey (10).

Lastly, if specific performance be decreed, it must be without compensation for Mrs. Holgate's life-interest. The plaintiff had notice of her tenancy; and notice of the existence of the tenant is notice of whatever interest the tenant has.

(The Vice-Chancellon: As between him and her he must probably be taken to have had notice of the nature of her interest.)

At all events, there was sufficient to put the plaintiff on inquiry.

Mr. Simpkinson, for the defendant, Mrs. Holgate.

Mr. Teed and Mr. Campbell, for the heir-at-law and administratrix of Lawson Holmes.

- (1) 51 R. R. 277 (10 Sim. 410).
- (2) 32 R. R. 148 (1 Sim. 63).
- (3) 7 R. R. 417 (10 Ves. 292).
- (5) 1 It. It. 411 (10 Ves. 252).
- (4) 18 R. R. 18 (1 Swanst. 43).
- (5) 44 R. R. 158 (1 Keen, 729).
- (6) 29 R. R. 61 (2 Sim. 78).
- (7) 34 R. R. 268 (1 Younge, 295).
- (8) 3 R. R. 100 (4 Sim. 126).
- (9) 45 R. R. 212 (3 My. & Cr. 63).
- (10) 60 R. R. 329 (13 Sim. 206).

Mr. Wigram, in reply, referred to Crosbic v. Tooke (1) and Nelthorpe Morgan v. Rhodes (2).

In addition to the authorities already referred to, the case of Mason v. Franklin (3) was mentioned upon the question of parties.

#### THE VICE-CHANCELLOR:

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This suit was instituted by Sir John Nelthorpe and Mr. Holmes. as co-plaintiffs, against Mr. Holgate and his mother, Mrs. Holgate. for the specific performance by them of a written contract, dated in March, 1841, made between Mr. Holmes and Mr. Holgate for the sale by Mr. Holgate to Mr. Holmes of the fee-simple in possession of a farm in Lincolnshire; the bill alleging, that Mrs. Holgate, having or claiming a life-interest in part of the property, had sanctioned or affirmed the agreement in respect of that interest: and also alleging, that in July, 1841, a written contract had been made between the two plaintiffs for the sale of the farm by Mr. Holmes to Sir John Nelthorpe upon terms substantially the same between them as those of the original contract between Mr. Holgate and Mr. Holmes. After the bill had been answered, but before either party had gone into evidence, Mr. Holmes died intestate, and Sir John Nelthorpe then filed a bill of revivor, or of revivor and supplement, against the original defendants, and the heir and personal representative of Mr. Holmes, for the purpose of making the suit effectual.

Upon these two bills the present parties have joined issue, and witnesses have been examined for Sir John Nelthorpe and for Mr. Holgate, who filed a cross-bill for discovery, which the late Mr. Holmes died without answering, but which has been answered by Sir John Nelthorpe. There has not been any answer, I may observe, to the bill in which Sir John Nelthorpe is the sole plaintiff, but no objection has been taken in argument on that ground, and, supposing any such objection capable of being successfully taken, if not waived, it has, I conceive, been waived.

The two contracts have been proved, and no objection arises on the face of either; but it is established by the evidence that Mr. Holmes, as between himself and Sir John Nelthorpe, obtained and entered into the first contract, either as the agent and on behalf of Sir John Nelthorpe, or at the request of Sir John Nelthorpe's

<sup>(1) 36</sup> R. R. 342 (1 My. & K. 431). (3) 57 R. R. 317 (1 Y. & C. C. C.

<sup>(2) 36</sup> R. R. 345 (1 My. & K. 435). 239).

NELTHORPE & HOLGATE, [\*214]

agent, \*and with the view on their part, and under a promise on Mr. Holmes's part, to Sir John Nelthorpe, that he should be allowed to purchase from Mr. Holmes the property in question on the same terms as Mr. Holmes and Mr. Holgate might agree to. Whether Mr. Holmes, as between himself and Sir John Nelthorpe, entered into the first contract strictly or exactly as the agent of Sir John Nelthorpe and on his behalf, is, on the whole evidence, not to my apprehension, clear. But, I think, it plainly appears that Mr. Holmes, Sir John Nelthorpe, and his agent Mr. Grantham, all, from the beginning and throughout, meant Sir John Nelthorpe to have the property, and that Mr. Holmes entered into the agreement of March without any notion of keeping the property himself, or of not being indemnified by Sir John Nelthorpe.

Whether, under all the circumstances as they really existed, if the contract of July, 1841, had not been signed, the provisions of the Statute of Frauds would, as between Sir John Nelthorpe and Mr. Holmes, have enabled Sir John Nelthorpe to reject the contract of March, if so disposed, or have enabled Mr. Holmes to keep the property and refuse to recognize any right or claim in Sir John Nelthorpe—what exactly was the origin or design of the contract of July, or what exactly is the character to be ascribed to that contract, I do not, and perhaps with confidence I could not, say; but these are questions, which, in my view, are not necessary to be decided, and which I do not decide.

It is not proved that Mrs. Holgate sanctioned or authorized the contract of March, and the plaintiffs' allegations in that respect must be treated, judicially, as without foundation. Nor is it proved, nor can I judicially consider, that before or when Mr. Holgate entered into that contract he was informed or had notice, actually or constructively, either that Mr. Holmes was not a principal in the transaction, or was under any promise or engagement respecting the agreement or the property, or that Sir John Nelthorpe \*had, or was to have, anything to do with the matter; and it is, I think, a just conclusion from the evidence, that Sir John Nelthorpe, Mr. Grantham, and Mr. Holmes, all, from the beginning and throughout, believed Mr. Holgate to be less likely to treat with Sir John Nelthorpe for the purchase than with any other person, and, if treating with him, to be likely to ask from him a price larger than Mr. Holgate would ask from any other person. The reason may probably have been, that Sir John Nelthorpe was a large landholder, residing in the immediate neighbourhood, to whom the

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acquisition of the farm in question might naturally be supposed, and may be taken as particularly desirable. I must consider the belief that I have mentioned to have led Mr. Holmes, Mr. Grantham, and Sir John Nelthorpe to the course that they adopted.

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It is not proved, and I cannot judicially conclude, that, when the contract of March was made, Mr. Holmes or Sir John Nelthorpe knew, or had actual notice, or (as between them and Mr. Holgate, or for any purpose of this suit) constructive notice, of the existence of any estate or interest in Mrs. Holgate, though many persons in the neighbourhood were aware of the fact, and though she was residing with her son Mr. Holgate on the property, which was farmed latterly by him. Mrs. Holgate's residence on the farm may well, as between herself and Sir John Nelthorpe and Mr. Holmes. have carried with it constructive notice of her rights, supposing that material to her; but it does not follow that it was notice as between Mr. Holgate in his character of vendor, and Sir John Nelthorpe or Mr. Holmes in the character of purchaser. estate and interest, whatever they were, are admitted at the Bar by Mr. Holgate's counsel to have been, at the time of the contract of March, known to Mr. Holgate and his solicitor Mr. Owston, who prepared that contract.

It is not proved, nor is there reason to believe, that any misrepresentation whatever was made to Mr. Holgate or \*his solicitor, unless so far, if at all, as it was a tacit misrepresentation in Mr. Holmes to deal as he did, without disclosing the circumstances that I have mentioned. Subject only to this qualification, if it is a qualification, the contract of March, 1841, must be viewed as one in all respects perfectly fair on the purchaser's part. The price may, upon the evidence, be considered as not only sufficient, but high, and Mr. Holgate had Mr. Holmes's personal liability on the agreement.

As it is not proved that Mrs. Holgate sanctioned or affirmed this contract, the bills as against her must be dismissed with costs, to be paid by Sir John Nelthorpe; and as the representatives of Mr. Holmes have not opposed Sir John Nelthorpe's case, they must have their costs from him also.

The real contest is, and has been, between Sir John Nelthorpe and Mr. Holgate; the latter resisting the suit altogether, and insisting, that, both upon form and upon the merits, the bills against him should be wholly dismissed, but that, if there ought to be specific performance at all, it ought to be without any

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NELTHORPE compensation or allowance on the ground of Mrs. Holgate's life-HOLGATF. estate: Sir John Nelthorpe, on the other hand, insisting, that he is entitled to a compensation and allowance in respect of it.

> The existence of any employment, connexion, or communication, of whatever nature, before the written contract of July, or independently of it, between Sir John Nelthorpe, Mr. Grantham, and Mr. Holmes, or any of them, is not stated or suggested by either of Sir John Nelthorpe's bills. His rights or claims in respect of the contract of March are not, upon the pleadings, represented as having any other origin than the contract of July. This however, considering especially what is put in issue by the first answer of Mr. Holgate, appears to me not to be an objection fatal to the suit; an observation applicable also to the failure of the case made against Mrs. Holgate. \*These are not grounds upon which, in my judgment, relief ought to be refused to Sir John Nelthorpe, if he is otherwise entitled to it against Mr. Holgate; a conclusion to which I come, independently of the cases of Parsons v. Briddock (1), Gordon v. Gordon (2), Attwood v. - (3), and Taylor v. Tabrum (4), but, without forgetting those cases; and whether viewing the original plaintiffs as principal and agent, or as purchaser and subpurchaser, I think that they were not improperly co-plaintiffs, and that, after Mr. Holmes's death, the suit was with sufficient formality and propriety continued by the surviving plaintiff as the sole plaintiff, making such persons defendants, as he did make defendants, to his second bill.

The agreement of July, 1841, may have been necessary to establish or evidence a title in Sir John Nelthorpe against Mr. Holgate and Mr. Holmes, or one of them; and, supposing it not necessary for such a purpose, I cannot view it as wholly immaterial or irrelevant. It was prepared and signed before the abstract was delivered. Mr. Holgate's first answer contains these passages with respect to Sir John Nelthorpe's connexion with the agreement of March. (His Honour here read the passages of the answer before set out: see ante, p. 49.) Under such circumstances, I find it impossible to say that the mode in which Mr. Holmes and Sir John Nelthorpe have stated their case and title, or the case and title of either of them on this record, has to any extent or in any manner damaged or prejudiced Mr. Holgate.

Then, with regard to the question of joinder, and to the question

<sup>(1) 2</sup> Vern. 608.

<sup>(2) 19</sup> R. R. 230 (3 Swanst. 400).

<sup>(3) 1</sup> Ruse. 353.

<sup>(4) 38</sup> R. R. 115 (6 Sim. 281).

of Sir John Nelthorpe being the only plaintiff in the bill of revivor, or of revivor and supplement; supposing the contract of March one fit to be enforced in equity against Mr. Holgate at all, it must be admitted that one at least of the original plaintiffs was a proper plaintiff \*for the purpose. Had the suit been so constructed as to make one of them the only plaintiff, I apprehend that Mr. Holgate could not have been heard to say that the other, if made a defendant, was improperly so made; nor can it be said that either of the plaintiffs was, when the suit was instituted, without an interest in the subject of the suit, or that their interests were or are conflicting. There is not, nor ever has been, any dispute or question between Sir John Nelthorpe and Mr. Holmes, or between Sir John Nelthorpe and either of the representatives of Mr. Holmes, who was personally, and whose estate is, liable to Mr. Holgate, by means of the contract of March, if for any purpose valid. If, then, one of the plaintiffs in the original suit was a proper and necessary plaintiff, and there was no conflict of interest between them, and each was concerned and interested in the subject of the suit, how could it be improper that they should be co-plaintiffs? The ordinary rule against making an agent a party has nothing in common with a case such The bill of the two plaintiffs thus, in my opinion, properly framed as to parties having been answered, and the suit in active progress, how could it be destructive of the suit or irregular, that Sir John Nelthorpe should alone revive and prosecute it against the original defendants, and the representatives of Mr. Holmes after his death? I think that it was not; and, in forming that opinion, I have not been solely, if to any extent, influenced by the consideration that the objections made are made at the hearing, and not upon a plea or demurrer, and that there has been neither plea nor demurrer to either bill, nor any answer to Sir John Nelthorpe's sole bill, nor any objection taken to the order of revivor; or by the consideration that after Mr. Holmes's death, had Sir John Nelthorpe not proceeded with the suit, he would have been liable to have the joint bill dismissed with costs to be paid by him upon Mr. Holgate's application, in default of reviving within a reasonable time; or by the consideration \*of the direct dealings between Holgate's solicitors and Sir John Nelthorpe's solicitors in that character, which took place respecting the abstract and title.

This brings us at last to the more substantial part of the case: and, first, as to the undisclosed connexion between Sir John Nelthorpe and Mr. Holmes, with reference to the agreement of March,

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upon which Mr. Holgate also insists as fatal to the suit. It must at the outset be remembered, that there is neither any proof, nor any averment, nor any reason to suspect that Mr. Holmes, or Sir John Nelthorpe, or Mr. Grantham, or any solicitor or agent of Sir John Nelthorpe, in answer to any question put to either of them or otherwise, has, at any time or upon any occasion, before or since the contract of March, asserted that Mr. Holmes was concerned or engaged in the treaty or contract of March, not as an agent, or not as a trustee; and though it certainly is not proved, or to be judicially considered, that, when Mr. Holgate signed that agreement, he thought or suspected that Mr. Holmes was not dealing solely on his own account, yet such a notion is not inconsistent with either of Mr. Holgate's answers in the cause, and is a supposition in support of which, if I had found evidence among the proofs in the cause, I should not have been at all surprised. I have looked in vain through the two answers of Mr. Holgate for an assertion or a suggestion on his part, that he had ever refused, or declined, or expressed or felt any disinclination to treat or contract with Sir John Nelthorpe, or to sell to him; or that Mr. Holgate, if he had known or suspected Sir John Nelthorpe to have, or to be intended to have, the benefit of the purchase, or an interest in the purchase, would not have entered into the contract; or that there was any ground of objection to dealing with Sir John Nelthorpe; or that Mr. Holgate would or might have obtained better terms from Sir John Nelthorpe than from any other person, or a better price if he had known the real circumstances; or that he acted on the \*faith that Holmes was a principal and not an agent in the matter, or anything to any such effect. And there is an equal absence of evidence to any such effect. How, then, under such circumstances, the price being sufficient and high, can I, upon the mere ground of that belief having been entertained by Sir John Nelthorpe, Mr. Grantham, and Mr. Holmes, which I have stated, and having actuated them, say that Mr. Holgate is not bound by his agreement? Such reasons are too weak and unsubstantial to form a ground upon which a court of justice can base its decisions. Questions of mere delicacy are not within its province.

[ \*220 ]

By the law of this country, as administered in every Court of Westminster Hall, the mere act of contracting with another in the name of an agent, that agent making himself liable, and not disclosing that he does not in truth contract on his own behalf, is not forbidden, but may effectively take place. If this right be exercised

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from a belief, well or ill founded, that, were the real relation Nelthorps between the agent and his principal known, the other party would, from mere caprice, or unreasonably, or from a bad motive, decline to contract, or would use the knowledge for the purpose of extortion, that can make no difference. Nor is the rule one that must be sought in the recesses of the law, familiar only to its professors. It is, on the contrary, one trite and popular, lying in the common track of ordinary life under the daily observation of all classes of men. Why, then, it may be asked,—if Mr. Holgate deemed the question for whom Holmes was contracting with him, one of any importance,—if he thought it a matter of consequence whether the estate that he proposed to alienate was to be enjoyed by this or that man,if it was an interesting point to be satisfied from what purse the money to be paid to him was to proceed,—or if he considered one man likely to be more malleable or flexible, more liable to pressure, or less cool in the operation of a bargain than another, and that this \*might be fairly made a source of gain,—was not a question asked by him or Mr. Owston of Mr. Holmes or his solicitor, the answer to which, if false, might possibly have given a defence against the contract; if true, or evasive, might possibly have stopped the progress of the transaction? No such question was asked; and it may be, perhaps, conjectured, that no information on such a topic was needed, or was thought material.

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The answers in the cause, I may add, would not have been less satisfactory, had it been stated by either of them when, how, or by what means Mr. Holgate first discovered, or first suspected, that, before or when the contract of March was made, Sir John Nelthorpe or Mr. Grantham had any communication on the subject with Mr. Holmes, or anything to do with the matter. But this is one of the heads also on which Mr. Holgate is silent. An eminent writer (1) has said: "Neque enim id est celare quidquid reticeas; sed cum, quod tu scias, id ignorare, emolumenti tui causa, velis eos quorum intersit ill scire;" a description or proposition within which, according to a just exposition of the expressions, "emolumenti tui causa," and "intersit id scire," the present case certainly, in my judgment, is not.

It is then said, that the existence of the life-estate of Mrs. Holgate, which is an objection, but probably the only objection, to her son's title, is a matter that was offered by his solicitor to be referred to a conveyancer, and entitles him, unless Sir John Nelthorpe will waive HOLGATE.

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NELTHORPS it, to be delivered from the contract of March, 1841, under this clause contained in it: "And it is hereby agreed and declared, that, if any dispute." &c. (His Honour here read the clause as But this objection of Mrs. Holgate's lifealready set out (1).) interest (she being entitled to reject, and rejecting, the agreement) is, as an objection to her son's title, one of a plain and unquestionable nature. The fact was \*perfectly well known to him when he entered into the agreement, and has, ever since the delivery of the abstract, been uniformly admitted on each side. There was not any dispute on this subject beyond the question of compensation or no compensation for a plain, clear, and admitted defect; and, if there had, a conveyancer has never been agreed on. If, indeed, Mr. Holgate had satisfied the Court, that he entered into the contract of March in ignorance of his mother's life-estate, or under a mistaken notion, that he was entitled to sell and could make a title to the feesimple in possession without her concurrence, or in consequence of any promise or representation on her part, that she would concur in the sale; or, if he had shown, that, when the agreement was made, either Mr. Holmes, Mr. Grantham, or Sir John Nelthorpe knew, or had, as between them and Mr. Holgate, notice, of Mrs. Holgate's interest or her son's inability to make a title without her consent, the case would have been different, and might, possibly, have been materially different from its present position. But, considering what is proved and what is not proved in the cause,—considering, that Mr. Owston has not, but might have been examined as a witness,-considering, that, when the agreement was made, Mr. Holgate knew, and Mr. Holmes and Sir John Nelthorpe did not know, of this objection to the title,—considering, that there has not been on the subject any mistake, on Mr. Holgate's part, in the view and understanding which the Court has of that expression,-and considering, that, by obtaining Mrs. Holgate's concurrence, he might have enforced against the will of Mr. Holmes and Sir John Nelthorpe, and may now obtain, specific performance of the agreement without compensation,-I cannot accede to the argument founded on the clause that I have just read, so far as this lifeinterest is concerned, but must hold Sir John Nelthorpe entitled to a specific performance, and that, unless Mrs. Holgate shall concur, her life-interest must be matter of compensation, supposing the title \*good or accepted in other respects. I so decide upon the ground of the particular circumstances of this case, without acceding

to the broad and general argument which has been urged on the plaintiff's part, as to the performance of contracts with compensation, wherever the vendor can give part, but not the whole, of what he has contracted to sell, and without saying what will be the effect of any other valid objection to the title appearing.

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There must be a general reference of the title, subject to Mrs. Holgate's rights, if the plaintiff desires it; in which case, an inquiry as to the nature and value of Mrs. Holgate's interest must be deferred or contingently directed.

I do not think it right to make any reservation as to the costs which Sir John Nelthorpe is to pay to Mrs. Holgate, or to the representatives of Mr. Holmes.

Considering the defence made by Mr. Holgate, it must be declared, that he is to have no costs to this time either of this suit or the cross-bill; and is to pay Sir John Nelthorpe's costs of this suit to the present time from the time of filing of the replication. The silence of the bills in this cause as to the agency or other connexion between him and Mr. Holmes before the agreement of July, the additional matter brought on the record by the arrangements between them, and, indeed, the circumstances of the case generally, induce me to say, that Sir John Nelthorpe should have no earlier costs, and should receive no costs of the cross-bill. All costs from the present time must be reserved.

## SPENCE v. HOGG (1).

(1 Coll. C. C. 225, n.—226, n.)

A purchaser who has bought property with notice of a previous contract for sale of the same property may be made a defendant to an action for specific performance of the previous contract.

The bill stated a contract by letter for the purchase, by the plaintiff, (through his agent Christian), of the defendants, the Hoggs, of a house and other property, at Middleton, in the county of York; that the property was afterwards advertized for sale by public auction at an inn at Middleton; that Christian attended at the place of sale, and, previously to the property being put up for sale, publicly and repeatedly declared, in the presence of the Hoggs and the other persons then present, \*that he had purchased the house and premises for the sum of 1201.; and that he held in his

1836. -

SHADWELL, V.-C.

> On Appeal. 1844.

Lord COTTENHAM, L.C.

[ 225, n. ]

[ \*226, n. ]

(1) The reporter has drawn up the statement of this and the following case from the briefs in the causes.

SPENCE v. Hogg. hand documents (viz. the letters) which were evidence of such contract; and that he, in the presence and with the knowledge of the Hoggs, deposited the 120l. in the hands of the innkeeper, and publicly declared, that, if after that notice any one should purchase the property, he would file a bill in Chancery against both buyer and seller. The bill further stated, that the defendant Wilson, and his solicitor Mr. Dinsdale, were present at the sale, and heard the declarations of Christian, and that Dinsdale saw the letters. That, nevertheless, the premises were put up for sale and bought in, and were afterwards sold to the defendant Wilson by private contract.

The bill prayed specific performance of the agreement entered into with Christian, and for a conveyance of the premises to the plaintiff; and that, if necessary, the defendant Ralph Wilson might be ordered to join in the conveyance.

The defendant Wilson, by his answer, admitted that he was present at a sale of a house and premises at Middleton on the day mentioned in the bill, and that on the evening of the same day he purchased, by private contract, the premises which were the subject of the suit; but he insisted that the premises put up for sale were not those which he purchased, they being differently described in the advertisement. (There was a slight error in the description in the advertisement.) He denied having heard the declaration of Christian, though he believed he was present at the sale; but he admitted that certain letters were shown by Christian to Dinsdale at the sale, and that Dinsdale was his solicitor.

The contract and the other material circumstances stated in the bill were proved by Christian (1). His evidence as to what took place at the sale was corroborated by other witnesses.

The cause came on for hearing before the Vice-Chancellor of England, in February, 1936, when his Honour decreed, that the agreement between the plaintiff and the defendants, the Hoggs, should be specifically performed, and the plaintiff be let into possession of the premises.

Upon appeal, by the defendant Wilson, to Lord Cottenham, L. C., his Lordship affirmed the Vice-Chancellor's decision, with costs, to be paid by the appellant.

Mr. Wigram and Mr. Geldart, for the plaintiff.

Mr. Temple and Mr. Parker, for the defendants.

(1) His evidence was objected to, but the objection was overruled by the COURT.

## COLLETT v. HOVER (1).

(1 Coll. C. C. 227, n.—228, n.)

Under special circumstances a purchaser seeking specific performance of a contract may join as defendant an adverse claimant to the property who disputes the validity of the contract.

1839.

Feb. 23.

Lord

COTTENHAM

L.C.

[ 227, n. ]

In 1825, Octavius Ryland, being entitled under his father and mother's marriage settlement to a reversionary eleventh share in 2,292l. Consols, defeasible by the joint appointment of the settlors, took the benefit of the Insolvent Debtors Act. The share in the Consols was not mentioned in the schedule filed by the insolvent. Amongst the creditors named in the schedule was Edward Woollams for 500l. for the purchase of an annuity of 40l., charged upon certain property which was insufficient to satisfy the arrears. In 1831, Ryland again took the benefit of the Insolvent Act. Woollams afterwards died, leaving Susannah Woollams his executrix. In 1832, the father of the insolvent died without having executed a joint appointment.

In October, 1833, Benjamin Lewis, as trustee and solicitor for Ryland, entered into an agreement in writing with Susannah Woollams for the purchase of the annuity and all arrears at the price of 450l.; the consideration-money to be paid on or before the 22nd day of November then next ensuing. About the same time, Thomas Woodley, having by himself or his attorney (who was the same Benjamin Lewis) notice of all the circumstances relating to Ryland's insolvency, purchased for about 800l. Ryland's reversionary eleventh share in the Consols. Out of the purchase-money, Lewis compounded at various sums with the creditors under the two insolvencies of Ryland, except Susannah Woollams, and procured from them a general release of their claims. The purchase by Woodley was completed by indenture of assignment, dated in January, 1834, but no notice of the assignment was given to the trustees of the settlement. In July of the same year, Susannah Woollams, having been unable to obtain from Lewis the completion of the contract of October, 1833, procured an order from the Insolvent Court, by which she was appointed assignee under the insolvency of 1825. In August, she served notice upon Lewis, that she abandoned the contract. In the following December, she,

to a contract are not proper parties to an action for specific performance o that contract.—O. A. S.

<sup>(1)</sup> Townend v. Toker (1866) L. R. 1 Ch. 446, 35 L. J. Ch. 608, 14 L. T. 531, is another instance of the relaxation of the ordinary rule that strangers

COLLETT C. HOVER.

[ \*228, n. ]

as assignee under the Insolvent Act, put up the reversionary interest in the Consols for sale at Garraways, when the plaintiff John Collett, without notice of the previous sale to Woodley, became the purchaser and signed an agreement for purchase, dated the 10th December, 1834, pursuant to the conditions of sale.

On the 5th February, 1835, Lewis, as the solicitor of Woodley, gave notice to the plaintiff of the agreement of October, 1833, for the purchase of the annuity, and of the assignment to Woodley of the reversionary share in the Consols; stating in such notice, that, if the plaintiff paid to the assignee under the Insolvent Debtors Act any purchase-money in respect of the same reversionary interest, a bill in equity would be filed against him.

In March, 1835, the plaintiff filed his bill against Susannah Woollams, Thomas Woodley, and Benjamin Lewis, praying, that

the agreement of the 10th December, 1834, might be specifically performed; that it might be referred to the Master to inquire, whether the defendant Woollams \*could make a good title, and had power to convey to the plaintiff and that the rights and interests of the defendants Woodley and Lewis in the purchase-money payable by the plaintiff, claimed by them under the notice of the 5th

Susannah Woollams afterwards married Hover, who was brought before the Court by supplemental bill.

February, 1835, might be ascertained.

The cause came on for hearing before Lord Cottenham, L. C., on the 23rd February, 1839, when his Lordship decreed, that the agreement of the 10th December, 1834, should be specifically performed; that the defendant, the assignee, should execute to the plaintiff a proper assignment of the reversionary sum of stock comprised in the agreement; and that the defendants Woodley and Lewis should pay the costs of the suit.

1844. June 12.

## YORK v. BROWN (1).

(1 Coll. C. C. 260-261; S. C. 8 Jur. 567.)

KNIGHT BRUCE, V.-C. The costs of a defendant trustee, notwithstanding he was a solicitor, ordered to be taxed as between solicitor and client.

A PERSON, who was made a defendant to this suit, in his character of trustee, was a solicitor. At the hearing of the cause the Court adjudged, that he was entitled to his costs, and the Registrar, in

(1) Stone v. Lickorish [1891] 2 Ch. 363, 60 L. J. Ch. 289, 64 L. T. 79.

drawing up the minutes of the decree, stated, in the usual form in relation to trustees, that such costs were to be taxed as between solicitor and client.

York ť. Brown.

A motion was now made, on behalf of the plaintiff, to vary the minutes, so as to give the defendant, on the ground of his being a solicitor, such costs, charges, and expenses only as he had properly paid out of pocket.

Mr. Russell, in support of the motion, cited Collins v. Carey, New v. Jones, and Moore v. Frowd.

Mr. Simpkinson and Mr. Wood, contrà.

#### THE VICE-CHANCELLOR:

I am of opinion, that, where a solicitor, who is a trustee, is a defendant as a trustee, and is held to be entitled to his costs, the course of the Court is to direct those costs to be taxed as between solicitor and client, as in an ordinary case. It is a different question, how the language of the decree is to be construed \*by the taxing officer. To say that the decree or order ought to declare that the party is entitled to no costs, except costs out of pocket, is, I apprehend, quite new. This case is not like those cited, which, if I may properly express any opinion upon them, seem to me to be correct as far as they go.

[ \*261 ]

### CURRANT v. JAGO.

(1 Coll. C. C. 261—268; S. C. 8 Jur. 610.)

1844. June 12.

A married woman invested certain monies in a savings-bank and in a private Bank, in the name of her nephew, whom she and her husband had adopted though his parents were both living: Held, under the circumstances of the case, that the monies were intended for the advancement of the nephew; and upon the death of the nephew intestate during his

KNIGHT BRUCK, V.-C. [ 261 ]

In the year 1815, the plaintiff and her husband William Currant, since deceased, adopted as their child William Currant Jago, then an infant, who was the nephew of the plaintiff, being the son of William Jago by Mary his wife, the plaintiff's sister. W. C. Jago was accordingly maintained and educated by William Currant and the plaintiff, and resided with them until he went to sea.

minority, the monies so invested were decreed to be paid to his administrator.

On the 23rd March, 1824, the plaintiff deposited the sum of 50l. in the East Kerrier Savings Bank at Falmouth, in the name of W. C. Jago. On the 25th May, 1825, the amount standing in his

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name had been increased, by additions of interest, to the sum of 52l. 6s. 1d. On the 5th July, in the same year, the plaintiff drew out of the Bank 2l., part of that sum. On the 20th November. 1825, the account had been further increased, by additions of interest, to the sum of 51l. 6s. 21d. On the 20th December the plaintiff paid the further sum of 30l. into the savings-bank, and by such last payment, and by additions of interest, the amount had, on the 20th November, 1828, increased to the sum of 91l. 8s. 5\frac{1}{2}d.; on the 20th May, 1835, the amount had increased, by the additions of bonus and interest, to the sum of 114l. 8s. 6\frac{1}{2}d.; on the 20th May, 1842, to the sum of 144l. Ss. 51d. With the exception of the before-mentioned sum of 2l., neither William Currant nor the plaintiff ever drew out any part \*of the money so standing in the savings-bank, but from time to time the plaintiff called at the Bank for the purpose of having the accumulations of interest added to the principal.

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On the 17th December, 1825, the plaintiff deposited the sum of 300l. in negociable securities in the Cornish Naval Bank, in the name of William Currant Jago, upon the security of an interest and deposit note of that date, whereby the Bank, thirty days after sight, promised to pay to William Currant Jago, or order, the sum of 300l., for value received, and interest, at the rate of 3l per cent. per annum till the day of acceptance, on the whole or such part thereof as might remain in their hands.

On the 23rd June, 1831, the plaintiff received all interest due upon this note, together with the principal sum of 300l. thereby secured, and she, at the same time, delivered up the note, indorsed in the names of "William Currant," "William Currant Jago," to the Bank to be cancelled. She, on the same day, reinvested the principal sum of 300l., at the Cornish Naval Bank, in the name of her husband and herself, upon the security of another note of the Bank, bearing date that day, whereby the principal sum of 300l. was made payable, thirty days after sight, to William Currant and the plaintiff Julia Currant, or order, together with interest at the rate of 3l. per cent. per annum, as before.

On the 16th April, 1835, the plaintiff's husband being very ill, she, through the medium of her sister, Mrs. Jago, received from the bankers the principal and interest secured by the note of the 23rd June, 1831. That note, indorsed in the names of the plaintiff and her husband, was, on the same day, delivered up to the Bank to be cancelled. At the same time, the principal sum of 300l. was again

invested in the Cornish Naval Bank in the name of William Currant Jago, upon the security of a deposit note dated the 16th April, 1885, whereby the principal sum of 800l. was made payable, thirty days after sight, to William Currant \*Jago, or order, together with interest at the rate of 3l. per cent. per annum, in the same form as before.

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On the 16th April, 1835, the same day on which the last-mentioned transaction took place, William Currant made his will, and thereby gave, devised, and bequeathed to the plaintiff all the money, security for money, goods, chattels, estate, and effects, of what nature or kind soever and wheresoever situate, and of which he might die possessed, for her sole and separate use for ever, and thereby nominated and appointed her his sole executrix. He died on the 19th May following.

William Currant Jago went to sea in the lifetime of the testator. He never returned, but died at sea, some time in the month of March, 1836, intestate and an infant.

On the 28th June, 1836, the plaintiff received from the then partners in the Cornish Naval Bank one year's interest on the deposit note of the 16th April, 1835, which became due on the 16th April, 1836; but, upon hearing of the death of William Currant Jago, the Bank declined to pay any further interest or the principal, except to his representatives.

Upon the death of William Currant Jago, his father, the defendant William Jago, who had obtained letters of administration of his son's effects, claimed to be entitled to the sum of 144l. 8s. 5½d. standing in the East Kerrier Savings Bank in the name of William Currant Jago, and also to the principal sum of 800l. invested in the Cornish Naval Bank on the security of the deposit note of 16th April, 1835, and then in the hands of the Bank, together with all interest due thereon.

The bill, which was filed by Mrs. Currant against William Jago, the trustees of the East Kerrier Savings Bank, and the proprietors of the Cornish Naval Bank, alleged, that the investments were made with the sole view and intention of providing for William Currant Jago, in the event of his surviving both the plaintiff and her husband; and it \*sought a declaration, that the sums of 144l.8s.5\frac{1}{4}d. and 300l., deposited and invested under the circumstances before mentioned, were held in trust for her, as widow and executrix of her deceased husband.

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The cause now came on for hearing.

With reference to the payment of 2l. to the plaintiff out of the B.R.—VOL. LXVI.

CURRANT e. JAGO. money at the savings-bank, it was stated by a witness named Joseph Earle, a clerk of the Bank, in his examination for the plaintiff, that, on the 5th July, 1825, the plaintiff came to the Bank and was paid, in the deponent's presence, the sum of 2l., being a year's interest on the deposit of 50l.; that the plaintiff brought no authority from William Currant Jago to receive the interest, but, on her stating that she required the interest for the use of the boy, the same was paid to her. The same witness, on his examination for the defendants, stated, that it was customary and usual for the savings-bank to require the person in whose name the money was converted to be present when the interest, or any part of the principal, was paid out of the Bank; but that, on the occasion of the plaintiff's receiving the 2l., the usual course had not been pursued.

Mr. Russell and Mr. Welford, for the plaintiff, admitted that the plaintiff and her late husband had maintained and educated the infant, and had intended to provide for his advancement; but they contended, that the presumption which arises in favour of a child, in the case of a purchase by a father in his child's name, does not arise where the party purchasing is only in loco parentis. such case, the question of advancement or no advancement is a question of circumstances. Here the money in the Cornish Naval Bank had, in every instance, been dealt with by the plaintiff and her husband as their own. The indorsement of the original note in William Current's name showed that he did not intend an immediate benefit for the infant. And, with respect to both funds, it was evident, \*(taking all the circumstances together) that the benefit to the infant was only intended to take place upon his surviving the They cited Loyd v. Read (1) and Murless v. uncle and aunt. Franklin (2).

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Mr. Wigram, Mr. James Parker, and Mr. Collins, for the several defendants.

In the course of the argument, Mr. Wigram, in answer to a question put to him by the Court upon the point of presumption in cases of adopted parentage, mentioned Ebrand v. Dancer (3).

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(THE VICE-CHANCELLOR: There the \*father was dead. Is there any case of grandfather, father, and son, the father alive?)

(1) 1 P. Wms. 607.

(3) 2 Ch. Ca. 26.

(2) 18 R. R. 3 (1 Swanst. 13).

#### THE VIOR-CHANCELLOR:

CUBBANT V. JAGO.

Mr. and Mrs. Current, being childless, appear to have taken upon themselves the care of the infant son of Mrs. Currant's sister. Although both the parents of the infant were alive, the fact is admitted that Mr. and Mrs. Current educated and maintained the boy as their own son, and that they intended to provide for his advancement in life. The plaintiff's counsel properly make that admission. In this state of things, Mrs. Current, who seems to have been an active person, (for her husband never appears in the transactions), made from time to time payments into a savingsbank in the name of the boy. She also received interest on the deposits; and on one of these occasions, as stated by the witness Earle, she came to the Bank and was paid the sum of 21., for a year's interest: it was paid to her upon her stating that she wanted it for the use of the boy. Now, if I am to look at this act at all, I must look upon it as an act done by her as agent for her husband. The case is so constructed that it must be looked upon as an honest act. We, therefore, find her, in the character I have stated, dealing with the fund as for the use of the boy. She then makes another payment to the same account, and calls at the Bank from time to time as the interest accumulates, to have it added to the principal, and no change takes place in the form of the investment. Considering the statement of the witness already mentioned, considering what a savings-bank is,-considering the mode in which this money was invested, and the admitted facts \*relative to the connexion between Mr. and Mrs. Current and the boy, there can be no doubt that this was intended to be the money of the boy, was vested in the boy by a legal title, and could not be claimed from him,—that is to say, was a gift executed; and that if, under some only of the circumstances, a presumption might have arisen in favour of the party whose money it originally was, the presumption is by all the circumstances taken together met and displaced, or prevented from arising.

If I am satisfied as to that part of the case, it is not an immaterial ingredient in the consideration of the circumstances relating to the other Bank; as to which, it appears that Mrs. Currant, with the consent, as I must take it, of her husband, carries certain negotiable securities to the Cornish Naval Bank, and receives in exchange for them a note for 300l. in the name of the boy, clearly vesting a legal title to the note in the boy. Some time afterwards, for what reason does not appear upon the evidence, she takes back

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the note, with the name of the boy upon it, and probably also, upon the evidence, with the name of her husband written upon it. and exchanges it for a note payable to her husband and herself, or their order. Now, if the infant ever had any legal title, that act Some time after this, the husband being ill. could not displace it. the plaintiff's sister carries back the note to the Bank, and replaces it by another note in the name of the infant, according to the original state of things. It is suggested, and probably with truth. that this was done at the request of the plaintiff, through apprehensions arising from the husband's illness; the employment of the sister seems to show a probable intention in favour of the It would be erroneous to say that the taking of this new note in the name of the infant varied the legal title, because the legal title was never displaced. That the interest was received by the plaintiff and her husband is \*nothing; it was received during the infant's minority by those who took upon themselves the office and duty of parents.

The intention of the uncle and aunt to maintain and benefit the child is not denied, but it is said that the benefit was contingent upon their dying in the infant's lifetime. I think it possible, that, if their attention had been called to the subject, the gift would have assumed that shape; but the circumstances never so presented themselves to the minds of the parties, and accordingly the matter was not so arranged. Looking at what was done at the savingsbank,-looking at the position in which Mr. and Mrs. Current had placed themselves in respect to the infant, and at the other circumstances of the case,-I am of opinion that the presumption in favour of William Current did not exist or is displaced, that there was not a trust for the plaintiff's husband, that the money was intended as an advancement for the infant, and that the condition upon which it has been suggested to have been given is not established by the evidence. I think that there is sufficient evidence to show that the legal title and the equitable title to the fund are the same.

Declare, that the defendant William Jago, as administrator of his son, is entitled to the fund, and let the trustees pay it over to him. Let the trustees of both classes receive their costs out of the fund. The plaintiff neither to receive nor to pay costs.

### MARTIN v. GLOVER.

(1 Coll. C. C. 269-272; S. C. 8 Jur. 640.)

1844. June 21.

KNIGHT BRUCE, V.-C.

A testator bequesthed the interest of 1,000*l*. stock to his granddaughter for life, and gave the residue of his personal estate to his wife. He then, after giving certain benefits to his daughter and granddaughter out of his real estate, directed, that, in case both of them, his said daughter and granddaughter, should die without leaving children to attain twenty-one, the proceeds of the sale of the real estate, together with the said 1,000*l*. stock, should go to the persons who would have been entitled to his personal estate under the Statute of Distributions in case he had died intestate.

Held, that upon the happening of the contingency the stock and subsequent dividends passed under this bequest and ceased to form part of the residue bequeathed to the testator's wife.

James Turtle, by his will, dated the 22nd December, 1840, gave 1,000%. 3%. 10s. per cent. Reduced Annuities to his executors, upon trust to pay the dividends to his the testator's wife, Hannah E. D. Turtle, she applying the same towards the maintenance of his grand-daughter Mary Ann Cleveland, the daughter of his daughter Mary, then the wife of James S. Martin, by her former husband, until she should attain twenty-one, and then to the granddaughter for her life, and after her decease to her children when they should attain twenty-one, with cross remainders between them. The will then contained the following bequest: "And all my household furniture, plate, linen, china, and household effects, and all other the rest and residue of my personal estate, of what nature or kind soever and wheresoever, I give and bequeath the same unto my wife the said Hannah E. D. Turtle."

The testator then, after devising certain freehold estates, gave the residue of his real estates to his wife for life, then in certain events to his granddaughter Mary Ann Cleveland for life, with remainder to her children at twenty-one, and in other events to his daughter Mary Martin for life, with remainder to her children other than Mary Ann Cleveland, at twenty-one. The will then proceeded as follows: "And in case both of them, my said daughter and \*granddaughter, shall die without leaving any child or children who shall live to attain the said age of twenty-one years, then I do hereby direct and declare, that all my said residuary real estate shall be sold by my said trustees, and that the proceeds of such sale, together with the said sum of 1,000l. stock hereinbefore bequeathed, shall be held and applied by my said trustees, in trust for the person or persons who would, under the Statute for the Distribution of Intestates' Effects, have been entitled

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to my personal estate in case I had not disposed of the same by will."

The testator died in August, 1848, leaving his widow and daughter, the only persons who would have been entitled to his personal estate under the Statute of Distributions, in case he had died intestate.

Mary Ann Cleveland died in the following December, the dividends up to her decease having been paid to the widow. The testator's daughter had another child, namely, William Martin, an infant. The bill was filed by the daughter and her husband, for the purpose of obtaining a declaration as to the rights of the parties.

Mr. Anderdon and Mr. Miller, for the plaintiffs, contended, that the 1,000l. stock was not included in the residuary gift to the widow. \* \* Then, inasmuch as the intermediate dividends until the happening of the event on which the legacy was to take effect were undisposed of, they must accumulate and go with the capital when the event occurred. The next of kin who would be then entitled to the benefit of \*distribution would be the present next of kin, namely, the plaintiff Mrs. Martin and the widow.

Mr. Austen, for the infant, submitted, that the next of kin to take would be those who might answer that description upon the happening of the contingency.

(THE VICE-CHANCELLOR: What, then, becomes of the words "in case I had not disposed of the same by will"?)

Mr. Shapter, (with whom was Mr. Warren), for the widow, being called upon by the Vice-Chancellor to state what he claimed, said, that he claimed the whole residue, subject to its being devested in case Mrs. Martin should die without leaving any child who should attain twenty-one; but, as one-third would be devested in favour of herself, the effect would be, that she would be entitled immediately to one-third of the capital, and the income of the remaining two-thirds until events should decide to whom the capital would belong. (He was then stopped by the Court.)

#### THE VICE-CHANCELLOR:

I cannot accede to the argument, that, if the will had stopped

MARTIN

U. GLOVER

at the words "and all other the rest and residue of my personal estate, of what nature or kind soever and wheresoever, I give and bequeath the same unto my wife, the said Hannah E. D. Turtle," the widow would not have been entitled to the fund in question. The word "other," as used by this testator, does not restrict the ordinary effect of the gift as a gift of residue. The testator, after enumerating several subjects, as household furniture, &c., goes on and bequeaths all other the rest and residue of his personal estate. I am of opinion, that these words, standing alone, would have constituted the widow complete residuary legatee, and, therefore, complete legatee of every interest in the stock which had not been disposed of.

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But the testator, or the person who had to prepare this will, in a subsequent part of it, proceeds to deal with the property in a manner that hardly coincides with what has gone before. Still the language of the will, whether the result of caprice or not, must be abided by, according to the ordinary rules of interpretation; and the effect here is, to take away from the residuary legatee a certain proportion of her legacy upon the happening of an event within the limits allowed by law. The testator has in effect said, "Though I have given this sum to my wife absolutely, yet, if my daughter and granddaughter die without leaving children to attain twenty-one, I will take it away from my wife and give it to those persons who would have taken my personal estate at my decease had I died intestate, of whom my wife may be one." The testator had a right to say so, and he has said so. This stock, however, is in fact a perpetual annuity, and the dividends must be received by the person to whom it is given till the contingency happens. Until that period, therefore, the widow will take the whole dividends. With respect to the capital, the persons to take are those who would have been entitled, under the Statute of Distributions, to the testator's effects, in case he had died intestate; the persons so entitled are the widow and daughter. They cannot, I think, take equally, because the description in the will is one not of persons merely, but of interest also. I will, however, hear this question argued, if desired. (Counsel declined to argue the point.) Then-

It being admitted that Mary Ann Cleveland died an infant without having been married, and that the testator's only next of kin at his death was Mrs. Martin, declare the widow absolutely MARTIN ©. GLOVER. entitled to one-third of the stock, and let the dividends on the other two-thirds be paid to her during the life of her daughter, or until further order. Liberty to apply.

1814**.** June 25.

## WOODCOCK v. MONCKTON.

(1 Coll. C. C. 273-280.)

KNIGHT BRUCE, V.-C.

Upon the construction of a post-nuptial marriage settlement: Held, that the covenants entered into by one party were binding upon him only upon the condition of the other party being bound by certain other covenants in the instrument; and that, as the latter party was under no obligation to execute the instrument, and refused to do so, the former party was not bound by the instrument in equity, although he had executed it, and although the covenants contained in it were for the benefit of an infant.

In 1835, a marriage was solemnized in Bengal, between the defendant Edward Henry Cradock Monckton and Caroline Rosa Woodcock, a daughter of the plaintiff, who had then attained her age of twenty-one years. At the time of the marriage, Caroline Rosa Woodcock was absolutely entitled, under the will of her grandfather, to the sum of 1,500l. cash, then in the hands of the plaintiff in England. No settlement was made previous to the marriage.

Upon the plaintiff being apprized of the marriage, he was desirous that a settlement should be executed; and, accordingly, some time in October, 1836, he proposed to the defendant Edward Monckton. the uncle of Edward H. C. Monckton, that the before-mentioned sum of 1.500l. should be settled on his daughter and her children: but that her husband should have the interest during the joint lives of himself and his wife, and during the remainder of his own life if he should survive her, and that, in the event of her having no children, the principal should be at her disposal by her will. The plaintiff, at the same time, proposed that he, the plaintiff, should covenant to give or bequeath the sum of 5,500l. for the benefit of his daughter \*and her children, and, in the event of her death without children, to give or bequeath half of that sum to the He also further proposed that the husband should covenant that he would, as his circumstances should from time to time permit, settle upon his wife and the children of the marriage an equivalent sum of 7,000l.; and that he should also covenant, that, in the event of his coming into possession of the Somerford estate, in Staffordshire, he would, under the provisions of his paternal grandfather's will, charge that estate with the

payment to his wife for her life of a jointure of 600l. per annum.

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These proposals were acceded to by the defendant Edward Woodcock Monckton, though not, as it appeared, with the privity of his MONGKTON. nephew; and it was agreed between him and the plaintiff, that they should form the basis of a settlement, to be prepared under the advice of their respective solicitors.

Before the settlement was prepared, Edward Henry Cradock Monckton transmitted to England a paper, dated June 7th, 1836, signed by himself and his wife, and addressed to Messrs. Fletcher, Alexander, & Co., which, after referring to a power of attorney given to that firm, in relation to the 1,500l. belonging to his wife, proceeded in these terms: "I shall feel obliged by your placing the same, both principal and interest, under the joint charge and control of my uncle Mr. Edward Monckton and the Rev. Charles Woodcock, Mrs. Monckton's brother, the above gentlemen to be joint trustees of the whole amount for Mrs. Monckton and her children, (should she have any), and to see that on my death she and her child or children conjointly receive the interest; and the principal, on her decease, (with the accumulated interest), shall be duly apportioned to her children, as, according to the judgment of the above trustees, the necessities of those children shall demand at the time of their coming of age. This much as regards the capital: the interest will, after the decease of Mrs. Monckton, be also left to the discretion of the \*trustees as to whether it shall be left to accumulate during the minority of the children, or whether it shall be spent according to their exigencies; but in case of Mrs. Monckton's decease without issue, I being the survivor, the capital, with accumulated interest, to revert to me: in the case of her being the survivor without issue, on her death the capital, with any interest that may have accumulated, to go to her eldest brother."

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In pursuance of the directions contained in this paper, the sum of 1,500l. therein mentioned was, on the 21st of February, 1837, invested in the purchase of 1,657l. Consols, in the names of Edward Monckton and Charles Woodcock the younger.

A few days after this investment was made, the settlement which had been agreed upon between the plaintiff and the defendant Edward Monckton, and the draft of which had been previously approved by their respective solicitors, was duly executed by them, with a view to its being sent out to India to be executed by Edward Henry Cradock Monckton and his wife.

The settlement purported to bear date the 24th of February, 1837, and to be made between Edward Henry Cradock Monckton WOODCOCK t. MONCKTON.

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and Caroline Rosa his wife of the first part, the plaintiff of the second part, and the defendants Charles Woodcock the younger and Edward Monckton of the third part. After reciting the marriage, and that there had been no previous settlement, and after reciting the title of the wife to the 1.657l. Consols, and reciting that plaintiff, being desirous of making a settled provision for the said Caroline Rosa Monckton and her said husband, and the issue of their marriage, had agreed to enter into the defeazible covenants thereinafter on his part contained, for the payment to the said Charles Woodcock the younger and Edward Monckton of the sum of 5,500l, sterling, with interest thereon as thereinafter mentioned, upon the trusts thereinafter declared of the same, in consideration of the \*settlement intended to be thereby effected by the said Edward H. C. Monckton of the sum of 1,657l. Consols, and of the covenants thereinafter entered into by the said Edward H. C. Monckton: It was witnessed, that, in pursuance of the said agreement, and in consideration of the premises, the plaintiff, with the privity and consent of the said Edward H. C. Monckton and Caroline Rosa his wife, did, for himself, his heirs, executors, and administrators, covenant with the said Charles Woodcock the younger and Edward Monckton, their executors, administrators, and assigns, that the plaintiff, in his lifetime, or his executors or administrators, within six calendar months next after his decease, would well and truly pay or cause to paid to the said Charles Woodcock the younger and Edward Monckton, their executors, administrators, or assigns, the sum of 5,500l. of lawful British money, with interest for the same as therein mentioned from the day of his decease, to be applied by them upon the trusts thereinafter declared concerning the same. It was then declared that the trustees should stand possessed of the 1,657l. Consols, and of the 5,500l. when received, upon trust, to pay the dividends to the husband and wife for their lives; and after the death of the survivor of them, in trust, as to the capital, for the children of the marriage, as the parents or the survivor of them should appoint, and in default of appointment, in trust for all the children equally, the shares of sons to be vested at twenty-one, those of daughters to be vested at that age, or married under that age with consent; and in case there should be only one such child. who being a son should attain that age, or being a daughter should attain that age, or be married with consent as before mentioned, in trust, for such one child absolutely: provided, that, in case there should be no such child, and Edward H, C. Monckton should

absolutely, and, as to the 5,500l., in trust for the appointees, &c. of his wife; with a further proviso, \*that, if the wife should die without such issue as before mentioned in the lifetime both of her husband and the plaintiff, the plaintiff's covenant as to the 5,500l. should cease; but that his executors should pay to the husband an annuity of 100l. for his life. The indenture then purported to contain covenants on the part of the husband to settle the property of the wife accruing during the coverture, and also a sum of 7,000l., to be raised from time to time by the husband, by means of instalments suited to his means, upon the same trusts as were thereinbefore declared concerning the 1,657l. Consols; and also to charge the Somerford estate, when he should come into possession of it, with a jointure of 600l. a year for his wife.

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Soon after the execution of this settlement by the plaintiff and the defendant Edward Monckton, it was sent to India for the execution of Edward H. C. Monckton and his wife. Before its arrival, however, in that country, Caroline Rosa Monckton died, leaving an infant child Rosa Monckton.

Edward H. C. Monckton received the settlement, but refused to adopt its provisions, and returned it unexecuted.

The bill, which was filed against Edward H. C. Monckton, Edward Monckton, Charles Woodcock the younger, and the infant Rosa Monckton, charged that the execution by the plaintiff and the defendant Edward Monckton of the indenture of the 24th February, 1837, was not absolute, but conditional, and not intended to render that indenture operative or binding upon the plaintiff or any other party thereto, unless and except in the event of Edward H. C. Monckton and his wife conforming thereto, and executing the same. The bill also charged, that the indenture was signed and sealed by the plaintiff as an escrow only. It prayed a declaration, that the indenture was inoperative and void, and that it might be delivered up to the plaintiff to be cancelled.

The defendant Edward Monckton, by his answer, submitted, \*that the infant defendant Rosa Monckton had an interest under the covenant of the plaintiff contained in the indenture, and that such interest did not depend upon the fact of the indenture being executed by Edward H. C. Monckton. He denied the allegation in the bill, that his execution of the indenture was only conditional, and intended to render the deed operative and binding on the plaintiff only in the event in the bill mentioned. He alleged, that

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WOODCOCK t. MONCKTON. it was not contemplated by him, nor, as he believed, by the plaintiff or any person concerned in the preparation of the deed, that the plaintiff's covenant therein should be conditional; and he denied, to the best of his belief, that the plaintiff's execution of the deed was conditional.

The cause now came on for hearing, and, in support of the plaintiff's case, the evidence of his solicitor was read. In the course of his evidence, the deponent stated that the deed was, as he considered, delivered by the plaintiff as an escrow.

Mr. Koe and Mr. Parry, for the plaintiff, contended, that, by the terms of the settlement, the plaintiff was not to be bound unless the husband was bound.

Mr. Wigram and Mr. Kenyon, for the defendant Edward Monckton.

Mr. Paton for the defendant Charles Woodcock the younger.

Mr. Swanston and Mr. Craig, for the infant defendant:

The plaintiff most distinctly executed the settlement. He may have done so in confidence that the husband would also execute it; but that does not relieve him of his obligation.

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(THE VICE-CHANCELLOR: It may be generally true, that, in ante-nuptial settlements, failure in the performance \*of covenants by one party does not exempt the other party. Was the husband bound to execute this settlement?)

Supposing the husband not bound, it is still a question, whether the plaintiff is entitled to the intervention of this Court. If he has taken upon himself an obligation for the benefit of an infant, upon what principle can he be relieved, in this Court, against the consequences of his own act? He contends, that he is not to be bound by the covenants which he has entered into, unless the husband executes the deed. But, if that question arises on the face of the deed, it is not a question for the consideration of this Court, but of a court of law: Simpson v. Lord Howden (1). If, on the other hand, it does not so arise, he must give in evidence circumstances rendering it proper for this Court to interfere. Now, he proposes, by the evidence of one witness, to show that the deed was delivered as an escrow. The witness, however, only says that he considered it to

(1) 45 R. R. 225 (3 My. & Cr. 97).

be so delivered. The probability, therefore, is, that it was delivered in the ordinary manner, which, in the case of an escrow, is insufficient: Shep. Touch. 58.

Woodcock r. Monckton.

#### THE VICE-CHANCELLOB:

The questions to be decided are, whether, in equity, the plaintiff Mr. Woodcock is or is not bound by this deed, and whether the Court ought to interfere to make a declaration on the subject, or leave him under this species of cloud, which, seeing that he certainly cannot be sued upon the covenant during his lifetime, would, unless removed, remain hanging over him during the whole of that period. Under the circumstances of this case, I think that it would be monstrous to say, that he should be left in such a situation.

It is recited in the deed, that the plaintiff had agreed to enter into the covenants thereinafter contained on his part in consideration of the settlement intended to be \*thereby effected by Edward H. C. Monckton of the sum of 1,657l. Consols, and of the covenants thereinafter entered into by the said Edward H. C. Monckton. One of these covenants is for the payment, by Edward H. C. Monckton, in a specified manner, of the sum of 7,000l. I am of opinion that the intention to be collected is, that Mr. Woodcock was not to be bound unless Mr. Edward H. C. Monckton should do. or become bound to do, that which is mentioned in the deed as to be done on his part. It is not contended, and could not be, that Edward H. C. Monckton was bound to execute this instrument or bound by any analogous contract or engagement. He had a right to reject the whole. He has rejected it. It is not necessary to say, and I do not say, whether, as to Mr. Woodcock, this instrument was a deed or an escrow. It is not necessary to decide, and I do not decide, whether an action could or could not be maintained upon it, after his death, against his executors. However these two questions ought to be answered, I am of opinion that it is the duty of this Court to declare, that Mr. Edward H. C. Monckton, having had the right, and exercised the right, to reject this arrangement, Mr. Woodcock is not bound by it.

The defendant Edward H. C. Monckton not having executed, and not intending to execute, and it appearing that he is not bound to execute, the instrument bearing date the 24th of February, 1887, declare that the plaintiff is not bound by it. Let the instrument

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MONCKTON.

be deposited in the Master's Office, there to remain till further order. Refer it to the Master, to inquire whether the defendant Rosa Monckton is the sole issue of the marriage; and if the Master shall find that she is the sole issue, let him inquire by what means the sum of 1,657l. Consols was purchased and acquired, and to what trust or trusts the same is subject, with liberty to state any circumstances specially.

1844.

June 26, 27.

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# HORLOCK v. SMITH. HORLOCK v. PRIESTLY. PRIESTLY v. HORLOCK.

(1 Coll. C. C. 287-300.)

Circumstances under which a mortgagee in possession was exonerated from having the mortgage account taken with annual rests.

A sum which was in Court at the time the mortgagee took possession: Held, under the circumstances, to go in discharge of the mortgagee's interest due at that time.

Rent received by the receiver before the mortgagee took possession, but not paid to her till afterwards, assumed, under the circumstances of the case, (but not decided), to go in discharge of the interest due to the mortgagee at the time of taking possession.

Rent which did not appear to have been received by the receiver before the mortgagee took possession: Held, under the circumstances of the case, not to go in discharge of the interest due to the mortgagee at the time of taking possession.

By the decree made on the hearing of the second and third mentioned suits, dated the 7th of December, 1827, it was, amongst other things, declared, that Jane Priestly, widow, the defendant in the second, and plaintiff in the third of the said suits, was the first incumbrancer upon the estate in question in the said causes, for what was due to her for principal and interest in respect of her mortgage in the pleadings mentioned. And it was referred to the Master, to take an account of what was due in respect of such principal and interest, and to tax her costs of the said suits. it was ordered, that the sum of 145l. 2s. 1d. cash in the Bank. placed to the credit of the cause Horlock v. Priestly, should be paid to the said Jane Priestly, in part satisfaction of what was due to her for principal and interest, and that the receiver, appointed in the causes, of the rents and profits of the estate in question, should be discharged, and \*should pass his accounts before the Master, and pay the balance which should be reported due from him to the said J. Priestly in further part satisfaction of what should be found

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due to her for principal and interest; and upon payment by the said receiver of his said balance to the said J. Priestly, he was to be at liberty to apply to this Court to have his recognizance vacated. HOBLOCK v. SMITH.

By a report of the 30th of August, 1830, made in pursuance of this decree, the Master certified that he had proceeded to take an account of the receipts and payments of the receiver from Lady Day, 1827, to which day he had passed his former account, to Lady Day, 1830; and he found, that the receiver had, during that time, received out of the rents and profits of the estate several sums, which, including the sum of 269l. 12s. 4d., the balance of the said former account, amounted in the whole to the sum of 668l. 8s. 4d.; and he found, that the receiver had thereout paid, for various outgoings, several sums of money, which, including his salary and the costs of passing his said account, and also including the said sum of 2691. 12s. 4d., (the balance of the said former account paid by him to the said Jane Priestly, the plaintiff in the third-mentioned cause, pursuant to an order for that purpose), amounted in the whole to the sum of 365l. 14s. 11d., which last-mentioned sum being deducted from the said sum of 663l. 8s. 4d., there remained in the hands of the receiver, on the balance of his said account to Lady Day, 1830, the sum of 297l. 13s. 5d.; which account being duly vouched, he the Master had allowed, and had caused the same to be entered in two books, one whereof, signed by him, was for the said receiver, and one remained in his, the Master's, custody; which said balance or sum of 297l. 13s. 5d. was to be paid by the said receiver to the said Jane Priestly, in further part satisfaction of what should be found due to her for principal and interest, according to the directions of the said decree.

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By an order of the 30th of November, 1830, the recognizance \*of the receiver and his sureties was ordered to be vacated.

By the decree made on the hearing of the sixth above-mentioned cause, dated the 16th December, 1887, it was ordered, that the orders and decrees made in the first three causes, dated the 7th March, 1820, and the 7th December, 1827, and the several accounts and inquiries thereby directed, should be carried on and prosecuted between the parties to the sixth suit in like manner as thereby directed between the parties to the previous suits; and it was referred to the Master, to take an account of the rents, issues, and profits of the mortgaged premises received by the said Jane Priestly, or which might have been received without her wilful default, or by

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any person or persons by her order or for her use, since she entered into possession. And the Master was also to inquire when the said Jane Priestly took possession of the premises, and what was owing to her when she so entered into possession on account of principal money and interest.

The Master, by his general report made in all the causes, dated the 23rd May, 1844 (amongst other things), found, that, by a surrender dated the 1st of May, 1790, Thomas Bennett and Elizabeth his wife executed a conditional surrender of the premises in question, which were holden of the manor of Weedonbeck, in the county of Northampton, to the use of the said Jane Priestly (by her then name of Jane Hutton) and her heirs, for securing the repayment of 1,000l. and interest, at 4l. 10s. per cent., on the 1st day of November then next. That the mortgaged premises were, in the year 1809, sold (subject to the mortgage) to Thomas Smith, one of the defendants in the first-mentioned cause, who continued the payment of the interest due on the mortgage up to the 1st August, 1818. after which time, the interest having got into arrear, Mrs. Priestly, for the purpose of proceeding by ejectment to recover the premises, applied to be admitted under the said conditional surrender, when it was discovered that the same, although duly \*presented, had, by neglect of the steward, been omitted to be inrolled; that Mrs. Priestly, however, obtained a presentment de novo of her mortgage security, and was duly admitted thereon, and paid the fine and fees and charges thereunder, which he the Master had allowed to her in her account as thereinafter mentioned. Master then found, that Mrs. Priestly took proceedings at law to recover the mortgaged premises, and ultimately recovered judgment in ejectment; and that she entered into or took possession of the said mortgaged premises on the 7th December, 1827; and that there was due to her for principal and interest on her said mortgage when she so entered into possession the sum of 1,420l. 18s. The Master then, after finding that Mrs. Friestly's taxed costs of the second and third suits had been paid by the defendant Yarde, a subsequent incumbrancer, found, that the mortgaged premises had been put up for sale under an order of the Court, and that the same with the timber had been sold for 3,423l., and the purchase-money paid into Court. And he further found, by the accounts which had been brought into the office by Mrs. Priestly and proceeded in before him, that, upon the balance thereof, and excluding therefrom several items which had been disallowed by him amounting to

286l. 11s. 3d., there then remained due and owing from her (computing the interest up to the 1st August, 1889, when all principal was paid off by applying the surplus rents beyond the annual amount of interest in reduction of the principal from time to time remaining due, after giving credit for all rents and profits received by her to the time she gave up possession to the purchaser as aforesaid, and allowing the several payments and disbursements in respect of the said estate as in the said account mentioned) the sum of 413l., the particulars whereof he had set forth in the schedule to his report.

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The schedule, in an abridged form, [is given on p. 82.]

To this report Mrs. Priestly took exceptions, on the ground that it appeared by the report that the account had been taken with an allowance of annual rests, whereas it ought not, under the circumstances, to have been so taken; and, further, because such rests had not been directed by any order or decree of the Court.

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The cause now came on for hearing on the exceptions, and also for further directions.

Mr. Wigram and Mr. Calvert, for the exceptions, contended, that, as there was a large arrear of interest due to Mrs. Priestly when she took possession, it was contrary to the whole course of authority to take the account with rests: [Wilson v. Cluer (1), Wilson v. Metcalfe (2).]

Mr. Simpkinson and Mr. Wilcock, for subsequent incumbrancers.

The effect of the several orders is, that the three first sums mentioned in the schedule as having been received by Mrs. Priestly must be considered as received by her when she entered into possession. If so, there was, at that time, a balance of rent due from Mrs. Priestly. \* \*

Mr. Swanston and Mr. Terrell, for other subsequent incumbrancers:

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The decrees reduce the case to one point. That of 1827 directs the receiver to pass his account and pay the balance to Mrs. Priestly. It is clear, that he has done so. What Mrs. Priestly receives from the receiver under that decree must be considered as a receipt before she takes possession. The receiver was her

<sup>(1) 52</sup> R. R. 65 (3 Beav. 136).

<sup>(2) 25</sup> R. R. 128 (1 Russ. 530).

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Cash received by Mrs. Priestly of receiver, pursuant to order of 7th December, 1827 .	Ditto Ditto	Half-a-year's rent of the tenant Ditto, due Michaelmas, 1830			One year's rent to Michaelmas, 1831	# # # # # # # # # # # # # # # # # # #	Balance of rent due at Michaelmas, 1838.	after payment of all principal and interest due to Mrs. Priestly Half-a-vear's rent due Lady Day. 1839	Ditto Michaelmas, 1841 .	Deductions for receiver's charges and repairs	Received by Mrs. P., after payment of all principal, interest, and costs, and to be refunded by her.
1829. Feb- ruary.	1830. Aug. Nov.	1831. March May			1832. Feb.	1838. Aug.					
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Principal due on mortgage, all interest paid thereon to 1st August, 1818	Interest thereon from the 1st August, 1818,) to the 1st August, 1831, being 13 years, at 4l. 10s. per cent. per annum			Balance of principal due 1st August, 1831 . One year's interest thereon to 1st August, 1832 .	Rent to Michaelmas, 1831	Balance of principal due 1st August, 1832 * * * * * * * * * * * * * * * * *	One year's rent to Michaelmas. 1838	Balance carried to the other side			
		1831. Jan. 24.			1832. Feb.	1838. Aug.					

agent under \*the decree; and she has received so much, that the Court would, on further directions, decree the account to be taken with rests, or would direct an inquiry. This last remark (the cause being now heard on further directions, as well as exceptions) disposes of the objection as to the Master's jurisdiction.

HORLOCK r. SMITH.

Mr. Pigott, for other subsequent incumbrancers.

Mr. Moxon, for other parties.

Mr. Wigram, in the course of his reply, contended, that the decree of December, 1827, was in favour of Mrs. Priestly; that the Master was not authorized, under that decree, to take an account of what was due for principal and interest at the date of the decree, but at the date of his report, and then it was to be ascertained at one gross sum without rests. \* \*

#### THE VICE-CHANCELLOR:

It is unnecessary to give an opinion upon the question, whether, in any view of the merits, it was competent to the Master, acting under the decree under which he was acting, to make the rests which he has made; for the parties have all agreed to argue the question of rests as one of substance, and not of form, as the cause is now heard upon exceptions and further directions, and, without referring to the form of the decree of December, 1827, in that respect, it is agreed on all hands, that, if the Master had taken the account without rests, it \*would be competent to the Court, upon the hearing for further directions, to order rests to be made.

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Upon the merits, therefore, of the case, the first question is, whether, when this lady took possession of the property in question, there was an arrear of interest due to her. She must be deemed, for every substantial purpose of this cause, to have taken possession at the date of the decree of the 7th December, 1827. She had then a legal title, not only by judgment, but by a title which preceded that judgment. The discharge of the receiver on that day left the mortgaged property open to her possession; and although he did, in fact, continue after that day to perform his functions, not only as to the rent in arrear, but subsequent rents, this did not enable her, or any other person, to say, that she did not take possession at that time.

Now, upon the 7th December, 1827, arrears of interest for many years were due to her. It is not disputed, that, merely calculating

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the annual interest at 45l., a sum exceeding 400l. was on that account then due to her. It is said, however, that this cannot be considered the real amount then due, because the sum of 145l. 2s. 1d. was ordered by the decree to be paid to her; and that, although not actually received by her, yet, for any substantial purpose, it cannot be contended, that it was not so received. That observation is, probably, right; and to this extent (though it appears, that, in fact, the money was not received till a considerable time afterwards) I shall consider the amount due at the date of the decree as diminished.

The receiver was discharged, as I have said, on the 7th December,

1827, and it was then ordered that he should pay to her what should be found due on passing his account. It appears, also, that, in December, 1827, his account had not been passed for some time; that the account up to February, 1827, was not passed till 1830; and that the receipt to February, 1827, was 269l. 12s. 4d. Now, without \*positively deciding, I will assume that this sum ought to be considered as then received by Mrs. Priestly. That would nearly, but not quite, equal the arrear of interest due to her.

It is further urged, however, that, the account of February not having been passed until a subsequent time, and the balance upon that account, namely, 297l. 18s. 5d., having been received in 1830, that sum also ought to be considered as received in or before December, 1827, inasmuch as it included a half-year's rent due at Michaelmas, 1827. I am of opinion, however, that it is impossible for me to treat any portion of the 297l. 18s. 5d. as actually or constructively in the hands of Mrs. Priestly when the decree of 1827 was made.

Assuming, as I have already said, but not deciding, that the 269l. 12s. 4d. ought to be taken as received by Mrs. Priestly on or before the 7th December, 1827, it would still leave her a creditor, by a few pounds, in respect of the interest of her mortgage. But it is to be considered that she had paid, at that time, 25l. 12s. 6d. for steward's fees and other charges upon admission; and, although that sum was expended for the purpose of the ejectment, it cannot be supposed that the Court meant to deprive her of it, especially as the Master has allowed it. I must, therefore, take into consideration this sum of 25l. 12s. 6d., which would increase the arrears due to her to more than 30l.

But that is not all: Mrs. Priestly had been engaged for years in a suit in which it appears that she was the party in the right,

defending a mortgage that had been attacked upon insufficient During the whole of this time she must have been paying, by herself or her attorney in the suit, considerable sums of money. I must take into consideration the circumstances of herself or her attorney being obliged to make this outlay, which, at a late period, was adjudged to be paid to her by one of the parties. I must \*also take into consideration, that so many years of arrears were due to her, not by her own fault or choice, but by means of the assertion (ultimately proved to be wrong) of a title adverse to her, which, being not clear upon the mere statement of it, rendered it fit that the Court should withhold from her the rents till the question was decided. I must also further consider, that, in this state of things, the result not of her own acts, but those of her opponents, she was, without any harshness or vexation on her part, driven to place herself in the not very agreeable, and, in her circumstances, not very safe position of mortgagee in possession.

Now, thinking, as I do, that, both upon principle and authority, the mere fact of an arrear of interest being or not being due to the mortgagee, when the mortgagee takes possession, is not decisive upon the question of rests, but that every circumstance must be regarded—looking at all the accompanying circumstances—looking at the general right of a mortgagee not to be paid piecemeal, looking at the position to which Mrs. Priestly has been driven by the wrongful acts of the parties opposed to her, I think that she ought not to be compelled to have her account taken with rests.

With respect to the question, what interest, if any, ought to be paid by the mortgagee, from the time when the surplus rents had satisfied the amount of the principal money due, not being desirous of making any decision or laying down any general rule on the subject, I recommend the mortgagee to consent to be charged with interest at 4l. per cent. upon the balances in her hands since that time.

The counsel for Mrs. Priestly then consented, on the part of their client, to be charged with interest on the \*rents received, from the time when the surplus rents equalled the amount of principal, and, by consent, a sum of 165l. was taken to be the amount of the arrears of rent and interest thereon.

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1844. July 3, 4.

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### CORT v. WINDER (1).

(1 Coll. C. C. 320-323.)

Upon the construction of a will: Held, that the residue of the testator's personal estate devolved to his cousins german, living at his death, except that the issue of any cousin, dying between the date of the will and the death, took the prospective share of the parent.

Upon the construction of the same will the share of a cousin, dying without issue between the date of the will and the death of the testator. was held not to have lapsed, but to have fallen into the bequeathed residue.

ARTHUR ARMISTEAD, by his will, dated the 10th November, 1832. after giving various legacies and annuities and directing that all the residue of his real and personal estate should be sold and converted into money, declared that his trustees therein named should stand possessed of the whole of the residue of the money so to arise from his real and personal estate, upon trust, in the first place, for securing the several annuities, and subject thereto, "upon trust for all and every of my first cousins german, to be divided equally amongst them share and share alike, to whom I give and bequeath the same: and in case any of my said cousins shall depart this life before their respective shares of the residue of my monies and personal estate shall become due or payable, leaving any lawful issue him or them surviving, I direct that such issue shall have and be entitled to the same share or shares of the same residue and monies as his, her, or their parent or parents would have been entitled to if living."

The testator died in May, 1837.

By an order made in this cause by the Vice-Chancellor of England, bearing date the 15th February, 1843, it was referred to the Master to inquire and state what first cousins german of the testator were living at the date of the testator's will, and whether any and which of them afterwards died in the lifetime of the testator, leaving any and what lawful issue.

The Master, by his report, after finding who were the first cousins german of the testator living at the date of his will, found that only two of them died after the date of the testator's will and in his lifetime, namely, John Howson and Arthur Cox Edmondson, and that the former died without issue, and the latter left seven children surviving him.

The question now argued was, who was entitled to the shares of the two cousins who died in the testator's lifetime.

<sup>(1)</sup> In re Potter's Trust (18.9) L. R. 8 Eq. 52, 39 L. J. Ch. 102, 20 L. T. 649.

Mr. Temple and Mr. Freeling, for the children of Arthur Cox Edmondson, contended, that those children were entitled to the share which their father would have taken, if he had survived the testator. They cited Smith v. Smith (1), and Gibbs v. Tait (2).

CORT r. Winder.

Mr. Spence, Mr. Russell, Mr. Bellamy, Mr. Bacon, Mr. Daniel, Mr. Collyer, Mr. Mylne, Mr. Cankrien, Mr. Rasch, Mr. Phillips, and Mr. Terrell appeared for the various other parties.

#### THE VICE-CHANCELLOR:

It seems plain, upon this will, that the testator meant the same persons to take the whole of the residue, and not one class to take one part, and another a different portion. I think that the words "due or payable" are referable to the time of the testator's death, and that the share of the cousin german dying in \*the testator's lifetime who left issue belongs to his issue. That introduces a difficulty as to John Howson's share, but I think I may decide that there is no lapse as to his share, and that it falls into the mass.

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On the following day, Mr. Phillips, who appeared for the testator's widow and contended that both shares had lapsed, referred to Gray v. Garman (3), Christopherson v. Naylor (4), and Viner v. Francis (5).

THE VICE-CHANCELLOR (after referring to Tytherleigh v. Harbin (6)):

My impression remains, that the testator here intended the whole of the shares in the residue to go to the same class of persons, the right to them to be ascertained at the same time, and that there should be no break or difference of division. I think that the words "due or payable," which are words susceptible of a variety of interpretations according to the context of the instrument in which they are found, ought in this will to be construed as having reference to the death of the testator; although it has been said to be difficult, or apparently difficult, to reconcile with that construction the sort of interpretation adopted in *Viner* v. *Francis*, and other cases of that kind, which attribute this class-description to persons who represent the class at the time of the death. It has been said

<sup>(1) 42</sup> R. B. 203 (8 Sim. 353).

<sup>(2) 42</sup> R. R. 136 (8 Sim. 132).

<sup>(3) 62</sup> R. R. 107 (2 Hare, 268).

<sup>(4) 15</sup> R. B. 120 (1 Mer. 320).

<sup>(5) 2</sup> R. R. 29 (2 Cox, 190).

<sup>(6) 38</sup> R. R. 121 (6 Sim. 329).

also that, if the construction which I consider the correct one be

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adopted, the effect must be to thwart the word "said," which, it is contended, is used in the will with reference to the cousins individually. But I am of opinion that this word is not of necessity, even literally, in the way. The testator has in the first instance used the words "my cousins german:" he afterwards says, "my said cousins." That may as well apply to cousins of the \*class before mentioned as to individuals. I think it may be read either way. No will, however, can be properly interpreted by taking its clauses separately; the whole must be read in order to obtain a just interpretation. And, doing so here, I think that the testator meant all his first cousins living at his death to take, with this single exception, that, if any of his first cousins, living at the date of his will, or born after its date, should die in his (the testator's) lifetime, leaving issue, then the share of the person so dying should

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## MITOTAL

go to his issue.

MEINERTZHAGEN v. DAVIS.

(1 Coll. C. C. 335—352; S. C. 13 L. J. Ch. 457; 8 Jur. 973.)

Upon the marriage of an Englishwoman with a citizen of the United States, who was temporarily resident in England, the fortune of the wife. consisting of stock in the British funds, was assigned to trustees, who were Englishmen, and relatives of the wife, upon certain trusts for the husband and wife, and the issue of the marriage. By the settlement, power was given to the trustees, with the consent of the husband and wife, to invest the trust property in the names of the trustees or trustee for the time being, in the public funds of Great Britain or America, or upon real securities in England, Wales, or America; and power was also given to the husband and wife or the survivor, in case the existing trustees should be desirous of being discharged from the trusts, to appoint new trustees. marriage, the husband and wife lived for about five years in England, and then went to reside permanently in America, having, previously to their departure, appointed three Americans to act as trustees in the room of the two original trustees, the trust property being at the same time transferred by the English trustees into the American funds in the names of the three . American trustees: Held, that this appointment of American trustees, though not expressly authorized by the settlement, was valid.

Upon the construction of the power for appointing new trustees and the clause for the indemnity of the trustees contained in a marriage settlement: Held, that the appointment of three new trustees in the room of the two original trustees of the settlement was valid (1).

By a marriage settlement, trusts of certain property in the English funds were declared in favour of the husband and wife and issue of the marriage.

(1) The statutory power of appointing new trustees under the Trustee Act, 1893, s. 10, which applies retrospectively to trusts created before as

well as after the commencement of the Act, authorizes the increase of the number of trustees (s. 10 (2) (a)).—O. A. S.

1844. July 23, 24, 25, 26. Aug. 3.

KNIGHT BRUCE, V.-C. [ 385 ] The trustees afterwards retired from the trust, having transferred the whole of the trust fund into the American funds, in the names of new trustees, who were Americans. Subsequently, upon an apprehension by the old trustees that this transfer amounted to a breach of trust, the husband deposited with them certain tobacco warrants, which, by a written agreement between the parties, the old trustees were to be at liberty to sell, for the purpose of recovering the trust fund, they, by the same instrument, in consideration of this security, agreeing to suspend proceedings in America for the recovery of the trust fund. In pursuance of this agreement the old trustees sold the tobacco warrants, and invested the produce in Exchequer bills; but it was afterwards decided by a court of equity in England, that, at the time of the execution of the agreement, no breach of trust had been committed; and that the old trustees had then no interest in the fund; Held, that, as there was no consideration for the deposit or agreement, the old trustees had no right, as against the husband or his representatives, to retain the Exchequer bills for the benefit of the infant children of the marriage.

MEINERTZ-HAGEN v. DAVIS.

In the year 1826, William Sidney Warwick, a native and citizen of Virginia, but resident and carrying on the business of a merchant in London, married Elizabeth Louisa Holdsworth, an Englishwoman.

By a settlement, dated the 4th April, 1826, and made previously marriage, the sums of 1,250l. and 3,028l. 6s. 6d., making together 4,278l. 6s. 6d. 3l. per cent. Consolidated Bank Annuities, and the sum of 1,740l. 10s. 3l. per cent. Reduced Bank Annuities, being the fortune of the intended wife, were assigned to Benjamin Goodwin Davis and George F. Davis, [upon trust to get in and receive the same and (with the consent in writing of the intended husband and wife and the survivor of them) to invest the same in any of the public stocks or funds of Great Britain or America, or upon real securities in England, Wales, or America, and (with such consent as aforesaid) to vary the investment thereof and to pay the income to the intended wife for her life,] without power of anticipation; after her decease to the intended husband for his life, or until he should become bankrupt; and, after the decease of the survivor, to apply the trust funds for the benefit of the children of the marriage as tenants in common.

[ 836 ]

The settlement then, after regulating the fortunes of the children, contained a proviso, that it should be lawful for the trustees, with the consent in writing of the intended husband and wife, or the survivor, to invest the trust fund in the purchase of any fee-simple lands or tenements in England, Wales, or America, either of freehold or copyhold tenure.

The settlement [contained the usual power for the appointment of new trustees, and directed that immediately after such appointment, the trust estate should be transferred so and in such manner as MEINERTZ-HAGEN C. DAVIS.

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that the same might vest in such new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case might require, upon the trusts thereinbefore declared concerning the same; and any one or more of the trustees was empowered] to allow to his and their co-trustee and co-trustees, all costs, charges, damages, and expenses which he or they or any of them should or might suffer, sustain, expend, or be put to in or about the execution of the aforesaid trusts, or in relation thereto.

Shortly after the execution of the settlement, the trust funds were duly transferred into the names of Benjamin Goodwin Davis and George Frederick Davis, who paid the dividends from time to time, as they became due, to Mrs. Warwick.

In October, 1831, the husband and wife addressed a letter to the trustees, requesting them to transfer the property from the British into the American funds; and expressing a wish, that, as it would be better, for various reasons, to have trustees resident in America, they would withdraw from the trust, and appoint Mr. Abraham Warwick, Mr. Corbin Warwick, and Mr. John M. Warwick, in place of themselves.

To this request the trustees, as they stated by their answer, did not object; and accordingly, by an indenture executed by the husband and wife, of the first part; the original trustees, of the second part; and the proposed three new trustees, of the third part; reciting, that the original trustees were desirous of being discharged from the trusts, the parties of the third part were appointed trustees in their room. This deed was executed on the 19th October, by the parties thereto of the first and second parts, and by Abraham Warwick, who, alone of the three new trustees, was then resident in England, and that for a temporary purpose \*only; Corbin Warwick and John Marshall Warwick, being resident in the United States of North America, of which country they, as well as Abraham Warwick, were citizens.

Immediately after the execution of this deed by the abovementioned parties, the husband and wife addressed and sent a letter to the original trustees, requesting them to transfer the sum of 4,278l. 6s. 6d. 3l. per cent. Consols, and 1,740l. 10s. 3l. per cent. Reduced Annuities, into the name of Mr. Abraham Warwick for the purpose of being invested by him in the United States stock, immediately on his arrival in America, in the names of the three new trustees. Accordingly, on the same 18th October, the original

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rustees transferred these two sums of stock into the sole name of abraham Warwick, and delivered to him the marriage settlement and deed of appointment. Abraham Warwick sold out the stock, and in the following month invested the proceeds of the sale in the purchase of 25,261 dollars in the United States 3l. per cent. Stocks, in the names of himself and the two other new trustees. This stock was, in 1832 and 1833, with the interest that had accrued, paid off by the Government of the United States, and the amount was, at the joint written request of Mr. and Mrs. Warwick, invested by the American trustees on a mortgage of estates in the State of Virginia.

MEINERTZ-HAGEN r. Davis.

In 1836, the original trustees Messrs. Davis, having been advised, that, in making this transfer, they had committed a breach of trust, requested William Sidney Warwick to cause the trust funds to be re-transferred into the British funds in their joint names, and called upon him to give them security for such re-transfer; whereupon dock warrants for 350 hogsheads of tobacco were delivered by him and his partner Thomas William Claggett into their hands, accompanied with the following memorandum, signed by the parties: "London, 19th November, 1836. We, the undersigned Messrs. Warwick and Claggett, have this day delivered into the hands of the undersigned Messrs. George \*Frederick and Benjamin Goodwin Davis, dock warrants for 350 hogsheads of tobacco, described as underneath, as security to Messrs. Davis for a sum not exceeding 6,000l., being the fund liable to a settlement made upon Mr. Warwick's marriage, of which settlement the said Messrs. Davis were trustees, and which funds, or security for the same, it is understood, are in the hands of brothers of said Mr. Warwick, in Virginia. This tobacco, said Messrs. Davis will hold as security until the expiration of twelve calendar months from the date hereof, when they are to be at liberty to sell for the purpose of recovering the trust funds; and, in consideration of this security, the said Messrs. Davis agree to suspend proceedings for the recovery of said trust fund from the said Messrs. Warwick, in Virginia; and, upon payment of this fund, they are to deliver over said tobacco to said Messrs. Warwick and Claggett, or their order; and, if required, are to send Mr. Warwick's brother a certificate that the same has been invested in the Bank of England. It is understood that the above security can be exchanged for any other that may be satisfactory to the aforesaid Messrs. Davis."

[ **\*34**0 ]

On the 12th May, 1837, a fiat in bankruptcy issued against

MEINERTZ-HAGEN T. DAVIS.

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William Sidney Warwick and his partner Claggett under which they were declared bankrupts.

The trust funds were never restored to Messrs. Davis. They, accordingly, on the 15th December, 1837, sold the tobacco mentioned in the warrants; receiving from such sale, after payment of expenses, the sum of 5,659l. 7s. 5d., which they laid out in the purchase of Exchequer bills.

The bill was filed by the assignees under the bankruptcy against the English and the American trustees, the husband and wife, and their three infant children; and it prayed, that the dock warrants and tobacco might be delivered up to them, and that the agreement of November, 1836, might be delivered up to be cancelled; and if the Court should be of opinion, that the plaintiffs were not entitled to have \*that relief until it was ascertained whether the trust funds had been duly invested in real securities in America, or in some other security, according to the provisions of the settlement, then that it might be referred to the Master to ascertain whether the funds had been so duly invested; and if it should appear that the funds had been so duly invested, then that the Exchequer bills might be delivered up to the plaintiffs; but if it should appear otherwise, then that the American trustees might be decreed to reinvest the funds in securities in this country upon the trusts of the settlement, and thereupon that the Exchequer bills might be delivered to the plaintiffs.

At the time of the filing of the bill, Mr. and Mrs. Warwick and their family were residing in England, where their three children had been born; but, after putting in their answer, which they did in September, 1887, they left this country for America, where they stated it to be their intention permanently to reside.

The cause now came on for hearing, and the principal questions were, first, whether the acts of the English trustees amounted to a breach of trust, so as to render it necessary for them to retain the Exchequer bills for their own indemnity; and, secondly, whether, if that was not necessary, they had not nevertheless a right to retain them as a security for the infants, on the ground of express contract arising under the document of the 19th November, 1837.

Mr. Wigram and Mr. R. Palmer, for the plaintiff, after observing, upon the first point, that the appointment of the three new trustees in the room of the original trustees was valid within the

Expect from Ex parte Davis (1), were stopped by the Court.

MEINERTZ-HAGEN c. DAVIS.

Mr. Swanston and Mr. Lee, for the defendants Davis. \* \* \*

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## CHB VICE-CHANCELLOR:

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The first question is, whether, immediately before the agreement of the 19th November, 1836, was made, Messrs. Davis were under any liability as having been trustees of the marriage settlement of Mr. and Mrs. Warwick, by reason of the acts which had been done. in which they participated or which they allowed. That question depends, first, upon the point, whether it was proper, when the two original trustees retired, to appoint three trustees instead of them. Generally, it is true, that there ought to be an adherence to the original number of trustees, where new trustees are substituted. This is conformable to the presumed intention of the parties, where nothing to the contrary appears: though, in the abstract, it may be difficult to suggest much inconvenience from appointing three trustees to act in the place of two who are dead. If, however, the instrument is so worded as to authorize an appointment of three trustees to succeed \*two, of course, such an intention appearing must have effect given to it; and I have already expressed my opinion, that this instrument contains expressions which cannot properly be interpreted consistently with the notion, that the parties did not contemplate or foresee that there might be an appointment of three or more trustees to succeed the two. Having already alluded to those particular passages, I need not repeat I have considered the matter since the case was before me yesterday, and I remain of opinion, that, assuming the general rule to be as I have stated, this instrument exhibits upon the face of it, taking the whole of it together, an intention to give a permission that there should or might be appointed three trustees. I think, therefore, no liability on the part of Messrs. Davis arises on that ground, having regard to the particular form and language of this settlement.

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The next objection is one of a more formidable nature, namely, that the three trustees substituted were American citizens, of whom one only was or is resident in this country. His residence in this country must be taken to have been only for a temporary purpose; and, without deciding the general question, I will assume, that, in

(1) 2 Y. & C. C. C. 468, where there was no special context, as there was in the present case.—O. A. S.

MEINERTZ-HAGEN 6. DAVIS.

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general, where there is a settlement made in England upon the marriage of English persons, though extending only to personal property, and the original trustees are English, it would be an imprudent and improper exercise of the power of appointing new trustees to appoint foreigners, or even to appoint English persons habitually resident out of England. But how does the present case stand? It is that of a settlement of mere personalty-of portions of the British funds belonging to an Englishwoman who marries a Virginian, a citizen of the United States, resident (I must take it for a mere temporary purpose) in England, and without any change of domicil proved or alleged to have taken place. domicil of origin, as we know, remains \*until it is shown to have been lost. The mere fact of being in a foreign country, or staying in a foreign country, does not, without more, change the domicil of I must, therefore, consider, that, in the present case, the domicil of origin of this gentleman was Virginian, and has continued so throughout his life hitherto. This being so, the instant that he married, and by the very fact of his marriage, the domicil of his wife became Virginian by necessity; and the settlement being thus made, in the English form I agree, but under circumstances rendering it probable and reasonable that the husband and wife would go to the United States, and that the children would become settled in the United States, we find, in that clause of it which authorizes the change of securities, a provision enabling the property to be invested in the Government funds of America, (the word, if used in its largest sense, being applicable not to the United States only), or in real securities in America, or in the purchase of lands in America.

It is quite plain, therefore, according to the intention of the parties, as expressed in this settlement, that the whole of the settled property might be withdrawn from the jurisdiction and power of the Court, leaving only the persons of the trustees answerable; and if those persons, so remaining answerable to the Court, were to show that they had obeyed the settlement by placing the funds within a foreign jurisdiction, according to the language of the settlement, they would be exempt from censure. The Court would in such a case have done with them, inasmuch as the object of the settlement would have been fulfilled. Now, such a case must have been contemplated as probable, and might most reasonably and properly have occurred. What then appears? The husband and wife propose to return to the country of the husband—to do that which

ras reasonable, and must probably always have been expected. see nothing in the case to induce me to form any other condusion, than that return was always contemplated. The return of man to his own country from a foreign land, in which he is not lomiciled, ever has been, and ever must be, contemplated in point The husband and wife then desire to have the funds. according to the terms of the settlement, invested in American securities, in the names of American trustees. The two trustees resident in this country, who are the brothers-in-law of the wife, or connected with the wife's family, are either desirous to be relieved from the trust generally, or are desirous of forwarding the objects of the husband and wife. They, accordingly, retire from the trust, and in their place are appointed three Virginian citizens, relatives of the husband—English in language, as I suppose the husband was— English in family origin, as the husband must be taken to have been, and, in all respects, standing on the same footing as the husband himself did. Now, I am asked, upon a settlement containing such clauses, and executed under such circumstances. to say that this was, of necessity, an improper appointment of trustees. I am of opinion, whatever may be the general rule, that, in this case, the course pursued was proper and justifiable; but when I make the observation, it is impossible to say that doubts and difficulties on the subject might not reasonably have suggested themselves to any counsel or adviser. I am, therefore, not at all surprised that the learned gentleman, so eminently capable of giving good advice, to whom Messrs. Davis referred on this occasion, should have thought it matter to be reasonably guarded against, and should have recommended them to take the security which they have done.

The next question is as to the safety of the funds. It appears that originally an irregularity was committed by Messrs. Davis, not ill intended, in placing the funds for a time without any indemnity in the sole custody of one of \*the new trustees. But from the hands of that single trustee the funds found their way, as I understand it to be proved, into the names of the three new trustees in the Government securities of America; and, that being done, Messrs. Davis, as I think, were altogether delivered from all liability and risk whatever under this settlement. At a subsequent period, however, when years had passed away, a difficulty was suggested upon the question whether the power of appointing new trustees had been properly exercised,—a difficulty which, I repeat, I do not at all

MEINERTZ-HAGEN c. DAVIS. [ \*847 ]

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MEINERTZ-HAGEN V. DAVIS wonder should have presented itself to the minds of the advisers of Messrs. Davis. That circumstance produced the paper which, in the opening of this case, was treated as a paper of mere indemnity. If it is a paper of mere indemnity, there was, in my opinion, nothing to indemnify against. The difficulty, in my mind, is, whether, consistently with all that I have stated, this paper is a paper of mere indemnity—whether it is or is not a binding contract, of which the infants have a right to avail themselves, through Messrs. Davis, for the purpose of restoring the funds to the jurisdiction of the English Courts. Upon that part of the case, and upon that part only, I wish to hear the counsel for the other parties.

July 25.

The cause was argued on a subsequent day upon the point last referred to by the Vice-Chancellor; and, for the more especial purpose of this argument, evidence was read on the part of the plaintiffs to show that the mortgage in Virginia was a satisfactory security.

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[On this question the Vice-Chancellor observed:] I have considered it, and, in doing so, have felt myself bound to bear in mind, that, were the trust property replaced in the English funds, the right to make an American investment under the marriage settlement would still remain; and that Mrs. Warwick approves of the present investment in America, disapproves of the claim now made by the survivor of the two original trustees, and by the representatives of the late Mr. Davis, and supports the case of the plaintiffs; as do her husband, and one at least of the new trustees.

If it were now clear that the present investment, the Virginian

[ **\*3**51 ]

mortgage, is one authorized by the terms of the settlement, and in conformity with its trusts, as those terms and trusts are understood in this Court, I should feel no difficulty. But that point is not, upon the evidence, clear to my mind; though, I may observe in passing, that I \*am not satisfied of the contrary, and that I think the substantial safety of the security highly probable. Whether, however, this mortgage is or is not an authorized security, is or is not an insufficient security, I am, upon consideration, of opinion that the plaintiffs, as the assignees of Mr. Warwick, the husband, and of the house of Warwick and Claggett, are entitled to have the Exchequer bills delivered to them. It is, I think, upon reflection, a necessary consequence of holding, as I do, that, before the year 1836 Messrs. Davis, and each of them, had ceased to be under any

liability in respect of the trusteeship, had ceased to have any conmexion or concern with it, had no right to make the demand which produced the deposit and agreement of November, 1836.

MEINERTZ-HAGEN DAVIS.

[The decree accordingly directed that the Exchequer bills should be delivered up to the plaintiffs.]

## TRAIL v. BULL.

(1 Coll. C. C. 352-362; rehearing, 22 L. J. Ch. 1082.)

1844. July 11, 12.

This decision was reversed on a rehearing by Parker, V.-C., and BRUCE, V.-C. his decision was affirmed by the Lord Chancellor on appeal, as reported in 22 L. J. Ch. p. 1082.]

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## FLINN v. JENKINS.

(1 Coll. C. C. 365-366; S. C. 8 Jur. 661.)

1844. July 20.

Under a bequest to two for their lives and then to be equally divided between their children, on the death of each tenant for life his moiety devolves upon his children.

KNIGHT BRUCE, V.-C. [ 865 ]

ROBERT FLINN, by his will dated the 22nd May, 1830, disposed of his property in the following terms: "I, Robert Flinn of Stacey Street, Compton Street, St. Giles-in-the-Fields, in the county of Middlesex, carver and gilder, do will the whole property belonging to me, not named in this my last will, to my wife Sarah Flinn, after her paying the following legacies; that is to say-The house, No. 3, Stacey Street, I give to my son Robert Henry Flinn; the house No. 2, Stacey Street, I give to my son Henry Flinn for their lives, and then to be equally divided among their children. son Henry Flinn is indebted to me, money lent, 2,000l.; the interest of which he is to pay to my wife Sarah Flinn as long as The residue of my remaining property, in the following manner, except the household furniture, plate, and wearing apparel, trinkets, &c., to be at her own disposal, and the remaining property to be equally divided between my two sons for their lives only, and then to be equally divided among their children, when of age. appoin my son Robert Henry Flinn, and my son Henry Flinn, executors, and my wife Sarah Flinn executrix."

The two sons and the widow survived the testator. Both the sons had children, of whom all survived their \*fathers and the

F \*366 1

FLINN v. Jenkins. widow. Upon the death of the widow, who survived the two sons, the present bill was filed by the adult children of Robert Henry Flinn, against the executors of the widow, the children of Henry, and the infant child of Robert Henry, praying, that the rights of the parties under the will might be ascertained and declared.

The questions raised were, first, whether the widow took an absolute interest, or an interest for life only, in the residue; secondly, whether the children of the sons took an interest in the houses, and an interest (if any) in the residue, per capita or per stirpes; thirdly, if they took an interest in the residue, whether it vested immediately, or not until they attained their majority.

Mr. Spurrier, for the plaintiffs.

Mr. Russell, Mr. Metcalfe, and Mr. Malins, for the several defendants.

The Vice-Chancellor was of opinion, that the widow was entitled to the residue for her life only, and that the children of the sons were entitled to the shares of their parents in the houses and in the residue per stirpes. His Honour added, that he was disposed to think that the shares of the children in the residue would not be vested until their majority; but that it was unnecessary to decide that question at that stage of the cause.

1844. July 25.

KNIGHT

BRUCK, V.-C. [ 367 ]

BURGESS v. BURGESS.

(1 Coll. C. C. 367-369; S. C. 8 Jur. 660.)

A legacy given to the testator's trustees and executors as a mark of his respect for them: Held, not revoked by a codicil appointing other trustees in their room, and giving a legacy of equal amount to the newly-appointed trustees and executors, in similar language.

The late Bishop of Salisbury, Dr. Burgess, after certain specific and pecuniary bequests to his wife and others, including the gift of a vase to his nephew, W. R. Burgess, devised unto his said wife, the Rev. T. S. Bright, G. W. Marriott, Esq., and the said W. R. Burgess, and their heirs, his freehold hereditaments upon trust for sale; and also bequeathed to them his leasehold premises and his personal estate, not specifically bequeathed, upon trust for conversion; and directed them to stand possessed of the proceeds arising from such sale and conversion upon the trusts afterwards mentioned. The testator then gave several legacies and annuities,

after satisfying which, he gave the income of his property to his wife for her life; and, after her death, he bequeathed various other legacies; among which occurred the following: To his said nephew W. R. Burgess 1,000l. sterling; to a lady who had lived with the testator and his wife some years 1,000l. sterling; and to each of his trustees, T. S. Bright, G. W. Marriott, and W. R. Burgess, the sum of 100l., as a mark of his respect for them; all which legacies he declared to be vested at his decease, though not payable till the decease of his wife. The testator then gave 2,000l. upon trusts for two of his nieces and their respective husbands and families in equal moieties, and the residue of his property unto and equally between his sisters and nephews and nieces living at the time of his decease. And he appointed his said wife, and the said T. S. Bright, G. W. Marriott, and W. R. Burgess, to be executrix and executors of his will.

Burgess v. Burgess.

By a codicil to his will, the testator, after reciting, that, by his said will, he had devised and bequeathed unto his wife Margery Burgess, and unto the Rev. T. S. Bright, G. W. Marriott, Esq., and to his nephew W. R. Burgess, his \*freehold hereditaments, leasehold premises, and personal estate, not specifically bequeathed, upon certain trusts, and appointed them executrix and executors, revoked the said devises and bequests, and the appointment of the said T. S. Bright, G. W. Marriott, and W. R. Burgess, as trustees and executors of his will, and devised and bequeathed his said freehold hereditaments, leasehold premises, and personal estate aforesaid, unto his said wife Margery Burgess, the Rev. Liscombe Clarke, Archdeacon of Sarum, and the Rev. Christopher Fawcett, and the survivors, &c., upon the trusts expressed in his will, and appointed them executrix and executors. He then gave to each of his said trustees and executors Liscombe Clarke and Christopher Fawcett the sum of 100l., in token of his respect for them, and directed the same to be paid at the decease of his said wife.

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One of the questions in the cause was, whether the legacies contained in the testator's will of 100*l*. to each of those whom he had first appointed trustees jointly with his wife were revoked by the codicil, which substituted other trustees in their place.

Mr. Wigram and Mr. Boyle, for the plaintiff, observed, that, in the bequest to the persons who were appointed trustees and executors by the will, they were expressly called trustees; and that a legacy of much larger amount having just before been given to

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one of them who was the testator's nephew, it must be presumed that those legacies were given to them, not in their individual but in their fiduciary character, and, consequently, that the revocation of their appointment as trustees was also a revocation of the legacies which had been given to them in that capacity: Reed v. Devaynes (1), Dix v. Reed (2), Piggott v. Green (3).

Mr. Simpkinson, Mr. Russell, Mr. Toller, and Mr. Hislop

\*Clarke, for some of the defendants in the same interest, adopted
the same line of argument.

Mr. Cooper and Mr. Jenkins, for the legatees.

Mr. Faber for other parties.

#### THE VICE-CHANCELLOR:

Supposing the codicil not to have existed, the only circumstance, I think, tending to create a doubt as to the character of the bequest to the persons named as trustees in the will is, that which has been adverted to, namely, that one of the legatees is a nephew of the testator, and entitled to other benefits under the will. however, think that circumstance of sufficient weight to countervail the plain import and effect of the bequest to these gentlemen (though they were truly called trustees) as a mark of the testator's respect for them. As to the codicil, the testator makes it with the will before him, and so making it, he might have revoked the legacies given by his will. He, however, does not do so. the general property to other persons upon the same trusts as are declared by the will, which trusts are to pay the legacies. I think it would be too great a stretch of refinement to say, that, because other persons are appointed trustees-because to them also he gives legacies equal in amount to the former, in token of his respect—therefore, the former legacies are revoked. I think that these legacies are due.

<sup>(1) 2</sup> R. R. 48 (2 Cox, 285).

<sup>(3) 38</sup> R. R. 83 (6 Sim. 72).

<sup>(2) 24</sup> R. R. 171 (1 Sim. & St. 237).

# WARD v. THE SOCIETY OF ATTORNIES (1).

(1 Coll. C. C. 370-381.)

1844.

July 26.

KNIGHT

On a motion made on behalf of the minority for an injunction to restrain the majority of the members of a corporation from surrendering their charter, with a view to obtain a new charter for an object different from that for which the original charter was granted, the Court granted the injunction until the hearing.

KNIGHT BRUCE, V.-C.

THE plaintiffs in this case were two of the proprietors of shares in the capital or joint stock of the society called the "The Society of Attornies, Solicitors, Proctors, and others, not being Barristers practising in the Courts of Law and Equity of the United The society was incorporated by a charter of incorporation granted by his late Majesty King William the Fourth, bearing date the 22nd December, 1831, for the purposes, as recited in the preamble of the charter, of "facilitating the acquisition of legal knowledge, and for better and more conveniently discharging their professional duties." The capital or joint stock of the society was to consist of the sum of 50,000l., divided into 2,000 shares of 25l. each, and of such further sum, not exceeding the sum of 25,000l., as might, pursuant to the resolution of any general meeting of the proprietors of the society, be raised by the creation and sale of new shares under the authority contained in the 22nd clause of the charter; by which it was declared, that it should and might be lawful for the proprietors of the society or such of them as should be present either in person or by proxy, at any general meeting specially called for the purpose, from time to time, to enter into a resolution to increase the capital or joint stock of the society to any amount to be specified in such resolution, not exceeding in the whole the sum of 25,000l., by the creation and sale of new shares of 25l. each; and, at the meeting where any such resolution should have been entered into, the number of such new shares and the manner in which the same should be offered for sale or distributed amongst persons qualified by the provisions of the charter to become members of the same society, and the terms and conditions which should be annexed to the taking and holding of such new shares, should be fixed and determined upon; and every such resolution, if confirmed by a subsequent general meeting \*of the proprietors of the said society, should in such case, but not till then, be binding upon all proprietors of the said society, and the capital or joint stock of

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(1) The propriety of this decision is doubted in text-books of authority.—O. A. S.

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the society should from time to time be increased to the amount specified in such resolution, so as the same should not exceed the additional sum of 25,000l.

By other clauses the proprietors were to share in the stock in proportion to their contributions thereto, and executors of deceased proprietors were enabled to assign the shares of their testators to qualified persons; but it was provided, that no member should ever be capable of holding for his own benefit more than twenty shares.

By the second clause of the charter it was declared, that, in case the assets of the society should not be sufficient to discharge the debts, contracts, and engagements of the society, the several proprietors, as members thereof, should be individually liable in their persons and property for such debts, contracts, and engagements, to the extent only of the amount of the unpaid part of the share or shares at that time held by any such proprietor or member in the joint stock of the society.

By the 17th clause, the committee of management had full power to do all acts which should appear to them necessary or fitting to be done, "in order to carry into full operation and effect the object and purposes of the said society, so always that the same be not inconsistent with, or repugnant to, the provisions of this our charter, or any existing bye-law, ordinance, or regulation, made, ordered, or agreed upon at any general meeting of the said society, or the laws and statutes of this our realm." And for the government of the society, it was by the 19th clause of the charter declared, that the proprietors thereof, or so many of them as should think fit to be present, should assemble and meet together for the election of the committee of management and auditors, and other purposes of the society, once or oftener in every year; and that the proprietors present at any such general meeting, \*or any adjournment thereof, should have full power and authority to declare a dividend or dividends out of the clear surplus of the income and profits of the society, or to withhold the same if they should think fit, or to make any other appropriation of the income and profits, or any other part thereof, they might think expedient.

By the 20th clause, it was declared, that, "at any such general meeting, it shall and may be lawful for the proprietors of the said society, or such of them as shall then be present, either in person or by proxy, to ordain and make such and so many bye-laws, rules, orders, and ordinances, as to them, or the major part of them, shall seem necessary, convenient, and proper, for the regulation

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and good government of the said society, and of the members and affairs thereof, and for fixing and determining the number of, and the manner of electing, the members of the committee of management and auditors of the said society, and the period of their continuance in office, and the manner and time in which any vacancies in the committee of management, or amongst the auditors, by death, resignation, disqualification, or otherwise, shall be supplied, and for settling and fixing the terms and conditions and the manner in which persons not proprietors may be admitted as subscribers to the hall and library and other rooms of the said society, or any of them, or any part thereof, and for convening any special meetings of the proprietors, and generally for carrying the objects for which the said society is founded into full and complete effect, with reasonable penalties, fines, and amerciaments, to be contained in such bye-laws, on the offenders, for non-performance of, or for disobedience to, the same; and the said bye-laws, rules, orders, and ordinances, penalties, fines, and amerciaments, or any of them, from time to time to alter, change, or annul, as the said general meeting shall think requisite, and to mitigate the same as they shall find cause, so as all and singular such bye-laws, rules, orders, and ordinances, penalties, fines, and amerciaments, be reasonable, \*and not repugnant or contrary to the laws and statutes of this our realm."

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By the 23rd clause it was declared, that, at any general meeting, every member should be entitled to one vote for every share held by him, and that the majority of the votes of the members present, either in person or by proxy, should decide upon all questions propounded at such meeting.

In accordance with the provisions of this charter, the society was formed, a capital of 50,000l. was raised, and a piece of land was purchased in Chancery Lane, upon which was erected a building, comprising a hall and library, and other rooms for the purposes of the institution.

At a special general meeting of the society, held on the 22nd August, 1843, the following resolutions were passed: "Resolved unanimously, that the present charter of incorporation of the society, with all the rights and privileges thereby conferred, be surrendered into the hands of her Majesty. That the common seal of the society be affixed to a proper deed or instrument for effecting the surrender of the said charter, and that such deed or instrument, when duly sealed, be inrolled in the Court of Chancery.

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That, in order to prevent any question from arising as to the devolution of the corporate property, upon the dissolution of the society, by the surrender of the present charter, the committee be authorized, previously to such surrender, to affix the common seal of the society to all such deeds or instruments as may be necessary for the purpose of vesting all the property of the said society, as well real as personal, in trustees, to be named by the committee. upon trust for the said society, and to permit and suffer the same to be used and enjoyed for the purposes thereof until the surrender of the present charter; and from and immediately after such surrender, and in the meantime, and until a new charter of incorporation shall be granted, upon trust for such persons as, at the time of the surrender of the present charter, shall be members of the \*present society; and from and immediately after the granting of such new charter of incorporation, upon trust to convey and assign the same unto the society incorporated by such new charter, their successors and assigns."

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The draft of a new charter had been prepared by the committee of management of the society, and contained the following recital: "And whereas it hath been represented to us, that the existence of a capital or joint stock, in which the several members of the society have individual rights of property, and from which they may derive pecuniary benefit, is no longer suited to, or consistent with, the important duties which have been confided to the management of the society; and that it is expedient that the constitution of the society should be re-modelled; and that the members thereof should not any longer possess any individual right of property in its capital or possessions, nor be entitled to derive any individual pecuniary advantages from the subscriptions, rents, and fees payable to the society; but that the whole income thereof should be applicable to the purpose of promoting professional improvement, and facilitating the acquisition of legal knowledge."

It was proposed, that the new charter should incorporate all the present members, and that the number of members to be elected into the society should be indefinite. The provision contained in the second clause of the existing charter was omitted in the draft of the proposed new charter.

Of 1,313 shareholders of the society, who were competent to vote at the general meetings, it appeared that all had expressed their concurrence in the proposed change in the constitution of the society except twenty-two, which latter number included the

plaintiffs, who were not present at the meeting of August, 1848. They now filed their bill against the corporation and its secretary, praying, that the said society, and the agents and officers thereof, might be restrained from conveying, assigning, or making over the real and personal property of the society, or any part thereof, \*to any person or persons, upon and for the purposes mentioned in the resolutions of the 22nd August, 1843, or any of such purposes, or in any other manner, in furtherance of the intention of the society to surrender the existing charter; and from affixing the common seal of the society to any deed or instrument for such purposes, or any of them; and from surrendering the existing charter, and affixing the common seal of the society to any deed or instrument for that purpose; and from accepting a new charter, according to the said draft, or otherwise inconsistent with the existing charter of the society.

A motion for an injunction, in accordance with the terms of the prayer of their bill, was now made on behalf of the plaintiffs. The proposed new charter had been approved of by the law officers of the Crown.

## Mr. Russell and Mr. James Parker, for the motion:

The attempt made by the defendants to change the whole constitution of this society, without the consent of every member, cannot be allowed by a court of equity: Adley v. The Whitstaple Company (1). One of the objects of this Society of Attornies is, "the better and more conveniently discharging their professional duties." building in which the society meets was intended for, and is used as, a place of business. Notices are left there, and deeds kept in places of security. According to the proposed scheme, these objects are to be abandoned, in favour of a general and indefinite plan of "professional improvement." In addition to which, a total change is to be effected in the property of the society. At present, its constitution is that of a joint-stock Company, possessing a limited number of shares, upon which a profit is contemplated. proprietor is entitled to a vote for each share up to the number of twenty. The shares devolve to executors and legatees, \*provided, that they do not succeed to the condition of shareholders. in pursuance of the new charter, an unlimited number of shares be created, the notion of proprietorship is at once put an end to. resolution of August, 1843, amounts to a notice of an intended

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breach of trust; it shows an intention in certain persons, without the consent of all the parties interested, to alienate the trust property to persons unknown, who are to hold it till the time comes for stripping the plaintiffs of their rights. On the plain principles of this Court as to trusts, your Honour will grant the injunction.

## Mr. Wigram and Mr. John Adams, for the defendants:

It is unreasonable that the wishes of the great majority of the

members of this society should be thwarted by the proceedings of a few individuals: it is more to the interest of the society that it should be devoted to professional improvement, than that it should be engrossed in considering the profits of shares. \* \* It is incident to the rights of a corporation to resort to Parliament for a change in their constitution: Ware v. Grand Junction Water-works Company (1); [and] the majority of members may direct the use of the corporation seal: Com. Dig. Franchises, (F. 11); and what is there to prevent the corporation seal from being set to the surrender of the charter?

## THE VICE-CHANCELLOR:

Certain gentlemen have associated themselves together for the purpose of founding an institution "for facilitating the acquisition of legal knowledge, and for better and more conveniently discharging their professional duties;" and they subscribe and pay considerable sums of money for carrying on the undertaking. They have purchased a piece of land in the county of Middlesex, and they have caused to be erected on it a building, comprising a hall and library, and other rooms for the various purposes of the institution. this footing they ask and obtain a charter of incorporation from the Crown, which, of course, must be understood to be for the purposes that I have mentioned. It gives the usual powers to acquire and to alienate property; and it is part of the charter, "That the capital or joint stock of the society to be used and applied in establishing and carrying on the undertaking, and, for the purposes aforesaid, shall consist of the sum of 50,000l. sterling, divided into 2,000 shares of 25l. each, and of such further sum, not exceeding the sum of 25,000l., as may, pursuant to the resolution of any general meeting of the proprietors of the said society, be raised by creation and sale of new shares, under the authority for that purpose hereinafter contained."

rtent of the 50,000l., as I understand it, the capital has been all rovided. Two or three or more of the shares \*of this society are epresented by the plaintiffs. The charter contemplates the possibility or probability of profits arising, and a division of profits among the shareholders who have contributed this capital. It gives, however, power not to the ordinary governing body, but to he general meeting, "to withhold the income, or to make any other appropriation of the income or profits, or any part thereof, which they may think expedient."

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Now, of course, such a corporation as this must be governed; and the 17th clause provides a committee of management: and, among certain functions which are detailed, but which it is not material now particularly to notice, they have this general power: "To do all such acts as shall appear to them necessary or fitting to be done, in order to carry into full operation and effect the object and purposes of the society, so always, that the same be not inconsistent with, or repugnant to, the provisions of this our charter, or any existing bye-law, ordinance, or regulation made, ordered, or agreed upon, at any general meeting of the said society, or the laws and statutes of this our realm." Now, certainly, one cannot imagine anything more repugnant to worldly existence, either natural or artificial, than death, whether natural or civil. There is, however, a higher and more extensive governing body, namely, the proprietors at a general meeting, the powers of which are defined by the 20th clause or section. "At any such general meeting, it shall and may be lawful for the proprietors of the said society," &c. (His Honour here read the 20th section.) It thus appears that the proprietors at a general meeting have power to ordain and make, and also to alter and annul the bye-laws, rules, and ordinances of the society; but the purpose of the bye-laws, rules, and ordinances, as stated in the former part of the clause or section, is "the carrying the objects for which the said society is founded into full and complete effect."

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Now, subject to an observation that I shall presently \*make, to the effect that I do not mean to decide any of these points now, it seems to me, that there is nothing more said with regard to the use of the common seal than is here expressed; that the use of the common seal is confided either to the committee or to the general meeting, as, in different modes, and under different circumstances, the governing bodies respectively may think fit to use it; and that the powers of the committee and of the general meeting to direct the

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use of the common seal are limited by conditions, which are inconsistent with the notion of applying the common seal for the purpose of procuring the annihilation of the society thus constituted. The law allows a corporation having perpetual succession and continuance to be constituted; the law allows subjects, with the consent of the Crown, to purchase that right from the Crown; the law allows individuals to acquire a beneficial interest in the preservation of such a body so lawfully constituted. And, if these things be so, I am not aware of any principle of law or equity which can enable that lawfully-constituted interest, thus obtained, to be taken away, without the consent of every person interested, unless by means of a condition to which the original creation was subject. I can find no provision warranting this act embodied in the creation of the institution, and it is plain that there are persons interested in the continuance of the society who object. I am not prepared to say, that it can be in the power of any person or persons, to whom the general authority of using the common seal is entrusted, to use it, without at least the consent of every member of the corporation, for the purpose of changing the nature of the institution.

It cannot be said that it was an immaterial purpose of the present institution, to assist and advance the better and more convenient discharge of the professional duties of the members. That is an object totally sunk and relinquished \*upon the plan of the new institution, for which there is substituted the general object (laudable in itself, no doubt) of promoting professional improvement. General it may well be called; the expression is so large, that it seems to me impossible to define its limits, at least without being perfectly assured of the sense in which the term is intended to be used by those who use it.

The case, however, does not stop here; for the present institution, in which the plaintiffs before me have lawfully purchased a valuable interest, (a valuable interest in the nature of property), does not, as I collect, authorize the possible introduction of any greater number of persons into the corporation than 3,000, and at present they are under 2,000. It is not at all likely, considering the number of shares that each individual holds, that they will exceed 2,000, still less likely that they will approach 3,000; but the number of 3,000 they cannot, as I am informed, and, as I believe, rightly

informed, exceed. Now, the first point which struck me upon this proposed new charter is, that the number of members of the society shall be indefinite. Is this object, from whatsoever motives, for

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however good reasons, on the part of men however respectable and honourable—is this object one that can be allowed to be effected against the consent of some persons lawfully interested in opposing it? It seems to me, at present, not.

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The two substantial objects of the present application are, to prevent the destruction of the corporation, and to prevent that alienation of the property of the corporation which is proposed for no purpose except its destruction. If such opinion as I have at present formed were more favourable to the case of the respectable defendants than it is, I could not allow the property to be so importantly affected before the hearing of the cause. It seems to me, that to do so would, in the strongest sense of the term, be an irremediable act. How could I, or any Court in the \*kingdom, restore these plaintiffs to their original position, if the act now sought to be restrained were done?

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Therefore, without pronouncing any conclusive opinion on this question, which is a very important one,—reserving to myself full liberty, if, on further argument and consideration, it shall seem to me right to do so, to decide against the plaintiffs in this case,—I see quite enough to render it a plainly proper and unavoidable course to grant the injunction as prayed, in this stage of the cause, without prejudice to any future question.

#### THOMPSON v. THOMPSON.

(1 Coll. C. C. 381—400; S. C. 8 Jur. 839.)

1844. Aug. 6.

The shares in the London Gas-light and Coke Company were not within the Statute of Mortmain.

KNIGHT BRUCE, V.-C. [ 381 ]

A testator, by his will, directed that the fourth part of the net annual income of his property (which was personal), should be paid in quarterly payments to the eldest son of E.; and that, on his decease, the quarterly payment of his annuity should be continued to his heir-at-law; and failing the latter by death, so on in like manner as long as there should be an heir: Held, that this was an absolute gift of one-fourth of the property to the eldest son of E. (see p. 115).

The testator, by his will, directed the income of one-half of his personal estate to be paid in equal shares to the eldest sons of his sisters E. and M. At the date of the will, an eldest-born son of M. was living, but he afterwards died in the testator's lifetime, leaving a second-born son of M. surviving him. After his death, and with knowledge of it, the testator, by a codicil, directed the trustees of his will to divide a certain sum among all the children then living of his sisters E. and M., with the exception of the two provided for in his will: Held, that the second-born son of M. took the share given by the will to her eldest son (p. 116).

The testator, by his will, directed, that a sum not exceeding 50l. a year

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should be paid in quarterly payments to a literary man, preferably not more than forty years of age. By a codicil, he declared, that his object was to give what little assistance he could to a worthy literary person who had not been very successful in his career, and, so far as possible, to enable him to assist in extending the knowledge of those doctrines in the various branches of literature to which the testator had turned his attention and pen: Held, that, provided the literary works of the testator were consistent with religion and morality, this was a charity to which the law of England would give effect (p. 118).

A bequest of 40l. a year for the best essays in statistics, &c., with reference to the testator's writings on the subject: Held, valid (p. 119).

The testator, after directing the income of his estate to be divided into moieties, and disposing of one moiety and making various bequests out of the other, directed that the remainder of the latter half, if any, should be given in occasional sums to deserving literary men, or to meet expenses connected with his manuscript works which he had previously directed to be printed. The trustees of the will declined to act: Held, that the gift failed (p. 120).

A testator first gave all his property to trustees upon certain trusts, and, secondly, directed, that the trustees, from the commencement of the fifth year from the date of his decease, should set apart annually 10*l*. per cent. upon the gross income of his estate, to be invested as additional capital, in some good and valid medium of profit or interest, in order that the new income derived from that might go to increase the benefits intended by the former. He then proceeded to dispose of the remaining income: Held. that no partial intestacy was created by the direction as to the 10*l*. per cent., but that the dispositions of the bulk of his property were to be treated as if it did not exist (p. 120).

This suit was instituted for the administration of the estate of a testator, Simon Gray, who had bequeathed legacies for charitable purposes. The Master having reported that thirteen old shares, and five new shares of 50l. each in the London Gas-light and Coke Company, part of the estate of the testator, were pure personal estate, an exception was taken to his report by the defendants, other than the Attorney-General, on the ground that such shares were within the third section of the Mortmain Act, (9 Geo. II. c. 36), whereby it is enacted, that "all gifts &c. of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments," to or in trust for any charitable uses, which shall be made in any other manner or form than by the Act is directed and appointed, shall be void.

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By the stat. 50 Geo. III. c. clxiii. s. 1, \* \* it is enacted, that, in case the Crown, by charter, "shall think fit, within three years after the passing of this Act, to declare and grant, that such and so many persons as shall be named therein, and all and every such other person and persons as from time to time shall be duly admitted members into their corporation, shall be a body politic and corporate,

y the name of 'The Gas-light and Coke Company,' to continue for and during the period' [and for the purposes therein mentioned].

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The 2nd section enacts, that it shall be lawful for the said orporation to raise and contribute amongst themselves \*a capital r joint stock, to be applied and used in establishing and carrying on he undertaking and purposes aforesaid, not exceeding the sum of 100,000l. sterling, to be subscribed in shares of 50l. each. \* \*

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By the 7th section, it is enacted, that the sum to be so subscribed shall be divided into shares of 50l. sterling each, and that no person or persons shall be a subscriber or subscribers for a less sum than 50l. sterling each, and that all shares in the joint stock and undertaking of the said corporation, and in the net profits and advantages thereof, shall be deemed personal estate, and not of the nature of real estate, and, as such personal estate, shall be transferable accordingly.

The Company was incorporated by charter, dated the 30th April, 1812. The other Acts of Parliament relating to it are the 54 Geo. III. c. cxvi., the 59 Geo. III. c. xx., and 4 Geo. IV. c. cxix.

Mr. Russell and Mr. Glasse, for some of the excepting \*parties. \* \* \*

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Mr. Malins, Mr. Welford, Mr. Simpkinson and Mr. Hubback, for others of the excepting parties:

\* Knapp v. Williams (1) and Ex parte The Vauxhall Bridge Company (2) apply to this case. Bligh v. Brent (3) and Attorney-General v. Giles are distinguishable. In the latter case, as reported in Shelford (4), Lord Cottenham proceeded on the ground that the shareholders had only a right, under the terms of the statute, to recover a per centage on the profits. Here, the profits themselves, the original subject-matter of the shares, are an interest in land.

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Mr. Swanston, Mr. Wigram, Mr. Bagshawe, and Mr. Austen appeared for other defendants.

Mr. Twiss and Mr. Wray, for the Attorney-General, were stopped by the Court.

## THE VICE-CHANCELLOR:

This question relates to shares in a trading corporation,

- (1) 4 R. R. 252 (4 Ves. 430, n.). 268).
- (2) 1 G. & J. 101. (4) 42 R. R. 268 (5 L. J. (N. S.)
- (3) 47 B. R. 420 (2 Y. & C. Ex. Eq. Ch. 44).

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constituted and regulated by a variety of Acts of Parliament, one of which makes the corporation perpetual, and by one or more of which makes the acquisition of landed property in fee-simple by the corporation is authorized. Beyond the observations that I have made, it is sufficient for the present purpose to refer with particularity to some provisions of the earliest of those Acts. (His Honour then read the several sections of the stat. 50 Geo. III. [before referred to], and proceeded as follows:)

I observe in passing,—without saying whether it is important,—that this Act does not simply provide that the shares shall be deemed personal estate, (which would have \*been sufficient for the mere purpose of devolution), but it says—"shall be deemed personal estate, and not of the nature of real estate, and, as such personal estate, shall be transferable accordingly." I make the remark in passing, without saying whether I should or should not have decided this case in the same way if those particular words had not been inserted in the Act. At present it is sufficient to say, that, in my opinion, the words are not to be disregarded.

Now, shares thus constituted are the shares in question; they are shares in a joint stock to be contributed by various persons, who are to combine in raising the sum for trading purposes. applied to trading purposes, the profits and advantages attending the capital stock that may be derived from trading are to be divided among the contributors. The only connexion of this concern with land, beyond the mere circumstance that all trades must be carried on in connexion with the earth on which we live, is, that it is to be carried on with the assistance of real property, to be acquired by the corporation. The shareholders are to have no estate in the real property, legal or equitable, but real property is to be held by the corporation as part of the general mass of the corporate property, real and personal, which being held and worked by the corporation, the net profits are to be divided by them among certain individuals, not one of whom has, legally or equitably, any right of possession of the land, or of entry upon any portion of it. Speaking otherwise than technically, this would sound to any unlearned person as little like a landed estate in a shareholder, as foreign, in respect of the shareholders, from any notion of what is called landed property, as anything that one can well imagine. would think, certainly, of calling an extensive holder of gas-light shares a great landed proprietor.

But it is said, that property of this description, because \*the

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profits are acquired by a certain connexion with the earth, with the aid of real estate held and managed by the corporate body, who eccive the profits, and with them or from them make dividends among the individual shareholders, is, as to the individual shareholders and their interests, a tenement or a hereditament, or an estate or interest in a tenement or a hereditament, or a charge or incumbrance upon a tenement or a hereditament, or an estate or interest in that charge or incumbrance. Now, it is possible, that, by an exceedingly strict interpretation of the term, property of this description in a shareholder might, in a sense and for a purpose, be brought within the range of a portion of those expressions: it is possible; but the question is, whether, upon a just interpretation of the whole of the Act of Geo. II., without regarding the title, which I do not regard for this purpose,—whether, upon a just and rational collection, from the language of the body of the Act, of its intention, it is a sound construction of this statute to say, that the expressions "lands, tenements, or hereditaments," or "charge or incumbrance affecting lands, tenements, or hereditaments," or "estate or interest therein," as used in it, are words properly applicable to a subject of this description. I am of opinion, that they are not; and without saying (nor is it necessary to say, and I hardly understand what the expression means) whether this property is pure personal estate, or not, I am of opinion, without any doubt, that it is property not falling within the range of any of the expressions contained in the stat. 9 Geo. II. c. 36, according to a just interpretation of the language of that Act.

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The cause now came on for hearing for further directions, when several questions on the construction of the will of the testator were discussed.

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The testator, who was a native of Dunse, in Scotland, but at the [ 388 ]

time of his death resided in England, made his will as follows: "First, I give, devise, and bequeath the whole of my real and personal property, whether consisting of lands, houses, public funds, manuscripts, or any other thing whatsoever or wheresoever situated, in trust for ever for the purposes hereinafter mentioned. to the gentlemen respectively holding for the time being, and so long as they shall hold them, the following offices in the University of Edinburgh, (mentioning certain professorships), and along with them the minister for the time being of the Established Church of Scotland in my native town of Dunse, in the county of Berwick;

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secondly,-and this is the manner which I appoint for the distribution of the annual income of my said property for ever,-from the commencement of the fifth year, the above-appointed trustees shall set apart annually 10l. per cent. upon the gross total income of the estate, to be invested as additional capital in some good and valid medium of profit or interest, in order that the new income derived from this may go to increase the benefits intended by the For further explanation on this point, they will consult a paper signed by me on the 19th March, 1830, marked 'Management of Gray's Trust or Fund.' (Here followed certain clauses marked respectively 3, 4 and 5.) 6. The income remaining after this deduction of 10l. per cent. shall be divided into two equal parts. 7. One of these I direct to be divided into two equal parts also. The first of these latter, or the fourth part of the net annual income remaining after deducting the aforesaid 10l. per cent., shall be paid in quarterly payments to the eldest son of my eldest sister Elizabeth, Mrs. \*Thompson, who shall add the name of Gray to his own, and, on his decease, the quarterly payment of his annuity shall be continued to his heir-at-law, and, failing the latter by death, so on in like manner as long as there shall be an heir. And the second of these fourth parts of the net annual income shall, in like manner, be paid to the eldest son of my younger sister Margaret, Mrs. Allan, and, on his decease, to his heir-at-law, and, failing the latter by death, so in like manner as long as there shall be an heir. These successive annuitants, both of Mrs. Thompson's and Mrs. Allan's branch, shall all be required to add the name of Gray to their own name."

By a codicil to his will, dated the 15th June, 1839, the testator directed his trustees to draw from his estate or property a sum equal to the amount of two years of the income left by him at his decease, adding, "And they will divide and distribute equally, share and share alike, the said sum among all the children then living of my sisters Elizabeth Thompson and Margaret Allan, with the exception of the two provided for in paragraph or clause 7, within a twelvementh after my decease, or as soon as conveniently can be."

At the date of the will, Elizabeth Thompson had two sons, the eldest of whom was the plaintiff, and a daughter, all of whom survived the testator. At the same date, Margaret Allan had several sons and daughters, John Allan being the eldest son. John Allan died in July, 1837, which was before the date of the codicil above stated; and it was admitted in the cause, that, at the time of making the codicil, the testator knew of his death. The other

children of Mrs. Allan survived the testator. The testator died in 1842, having survived both his sisters.

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The questions were, first, what interest was taken in the testator's property by the respective eldest sons of Mrs. Thompson and Mrs. Allan; secondly, whether, under the bequest to the eldest son of Mrs. Allan, the person who \*was her eldest son at the date of the codicil and of the death of the testator was entitled.

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Upon this part of the case, Seale v. Seale (1) and Cursham v. Newland (2) were cited.

#### THE VICE-CHANCELLOR:

Subject to the question as to the construction and effect of the directions with regard to the reservation and the qualified accumulation of 10l. per cent. on the income, to which I shall advert by-and-by (3), the construction of the testator's testamentary instruments, in the respects which have been the subject of argument, appears to me to be thus: The first question arises upon the disposition of the income of a moiety in favour of the eldest sons of the two sisters. It has been properly stated by Mr. Twiss, that an absolute gift of the annual income is an absolute gift of the body or subject from whence the income arises. The testator. after giving all his property, which, as I understand, includes considerable personal estate, but does not include any English real estate, directs it to be divided into two equal parts: he then says, "One of these I direct to be divided into two equal parts; the first of these latter, or the fourth part of the net annual income remaining after deducting the aforesaid 10l. per cent., shall be paid in quarterly payments to the eldest son of my eldest sister Elizabeth, Mrs. Thompson, who shall add the name of Gray to his own; and, on his decease, the quarterly payment of his annuity shall be continued to his heir-at-law; and, failing the latter by death, so on in like manner as long as there shall be an heir." The use of the word "annuity" and the direction \*for quarterly payments may be disregarded. It seems to me, that, according to the true construction of the instruments, this is a sufficiently plain gift of a fourth part of the property absolutely to the eldest son of Mrs. Thompson. I think that it is not a life estate: I think that the

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on further directions; but it has been thought convenient on the present occasion to report the various topics comprised in the judgment separately.

<sup>(1) 1</sup> P. Wms. 290.

<sup>(2) 50</sup> R. R. 133 (2 Beav. 145).

<sup>(3)</sup> See post, p. 120. The VICE-CHANCELLOR pronounced judgment at once upon the whole cause as heard

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words "heir-at-law," and the words "so on in like manner, as long as there shall be an heir," ought to be treated as mere words of limitation, and as a mere amplification of the notion of an absolute interest. The person who was the eldest son of Mrs. Thompson when the will was made continued to be so at the testator's death, and survived him.

With regard to the other half of the moiety of his property, the testator says, "And the second of these fourth parts of the net annual income shall, in like manner, be paid to the eldest son of my youngest sister Margaret, Mrs. Allan, and on his decease to his heir-at-law; and, failing the latter by death, so on in like manner as long as there shall be an heir." The observations already made apply to that share also, subject to the question of the ascertainment of the person. It appears that the person who was the eldest son of Mrs. Allan at the time the will was made died in the testator's lifetime, a bachelor. She had a second son when the will was made, who was her eldest surviving son and heir-apparent at the time of the testator's death. It is unnecessary for me to say what I might have thought right,-if I know what I should have thought right,—had the last codicil, and the admitted fact to be taken in connexion with it, not existed. It is, however, an admitted fact, that the person who was the eldest son of Mrs. Allan when the will was made died before the codicil of the 15th of June, 1839; and it is an admitted fact, that, when the testator made the codicil of the 15th of June, 1839, he knew of the death. Considering that state of circumstances, and the terms of the codicil, I am \*of opinion that the eldest surviving son of Mrs. Allan became entitled to this share.

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The rest of the testator's will was in the following terms: "8. The other remaining half of the said net income I direct to be disposed of in the following manner: 1-8. The sum of 50% sterling, more or less, shall be annually distributed, in a weekly allowance of bread, among twelve poor old persons residing in the parish of Dunse, with some occasional donations to them and to others. 2-8. A sum not exceeding 50% a year shall be paid in quarterly payments to a literary man, preferably not less than forty years of age. This man shall be selected by the aforesaid trustees, and the annuity shall be continued to him for life, unless the trustees shall find reason, from his unfit or improper conduct, to discontinue him. 3-8. A sum not exceeding 40% a year is to be

given in money or medals for the best essays in statistics, politics or government, criticism, and moral philosophy, &c., with reference to the doctrines maintained in my writings on those subjects.

4-8. The remainder of the said half, if any, shall be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works. 9. And I appoint my old and tried friends, Captain Isaac Shaw and William Sewell, Esq., of the Veterinary College, to act as executors of this my will, for the purpose only of assisting in having the whole of my property put into the possession of my aforesaid trustees, for the purposes above stated."

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With respect to the gift to the literary man, the testamentary paper [referred to by the testator in his will] contained the following directions:

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"The Literary Annuitant: This gentleman must have the votes of four, at least, of the five trustees, to render his election good. He is to have the annuity as long as he deserves it by his good conduct, but no longer. It is fair to require the votes of four at least, also, to remove him. He should preferably be at least forty years of age, but he must be a believer in Christianity. is an indispensable qualification. As to the sect to which he may belong, that is a matter of inferior consideration; but it will be better in every point of view that he should be a Protestant, and let him be so. Perhaps it may be more desirable that he should be at least nominally a member of either of our two Established Churches; he should be moderate, and not a highflyer. trustees are perfectly capable of making a due selection, and I say nothing further as to qualification. My object is to give assistance to a worthy literary person, who hath not been successful in his career, and as far as possible to enable him to assist in extending the knowledge of those doctrines in the various branches of literature to which I have turned my attention and pen, in order to ascertain what appeared to be truth, and to teach it to those who would listen. Should any of the manuscripts be published, if the gentleman chosen can \*be useful, he should preferably be employed, and receive a fair reward for his care and trouble. In those cases. should any such occur, in which the subject is out of his line, the trustees will, of course, use their discretion in employing some other literary gentleman, and reward him liberally according to This is in the spirit of the literary part of the circumstances.

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[ \*398 ]

fund, the object of which is to give what little assistance it will afford to deserving literary men who have not been very successful."

[ 397 ] THE VICE-CHANCELLOR, (after reading clause 2-8 of the will):

Supposing the words "not exceeding" out of the case, an argument might possibly have arisen upon this clause, standing alone, as to the question, whether this is or is not in the nature of what, by the English law, is considered a charity: it might have possibly been a difficult question, upon which I say nothing. I think that substantial assistance is afforded by the testamentary paper. (His Honour here read the testamentary paper as it applied to this part of the case, laying considerable stress on the last My opinion is, that, supposing a certain property devoted to this purpose, it is the establishment of that which the law of England considers a charity,-a public purpose falling within the definition of the expression "charitable purposes," and that the law will, accordingly, give effect to it. Understanding it to be admitted, that the testator's writings, published and unpublished, contain nothing irreligious, illegal, or immoral, I have no doubt that this is a legal disposition, according to the law of England.

Then the question turns upon the words "not exceeding;" and

I confess, that, but for the case decided in 1771, I should have felt great doubt, whether, these trustees having disclaimed and declined to act, there was a gift of anything,—whether there was a certain subject here devoted to this charity. But that case having been decided, I willingly avail myself of the precedent, and, therefore, hold this bequest to be good to the extent of 50L a year, supposing neither atheism, sedition, nor any other crime or immorality to be inculcated by the works. Subject to this condition, I shall declare the bequest to be valid according to the law of England; and I shall also declare, upon the whole of the testator's testamentary instruments \*taken together, that it was his intention that this charity should be established in Scotland. And let it be referred to the Master, as in the other case, to inquire, whether, by the law of Scotland, such an institution can lawfully be established there, and to consider the best mode of carrying it into effect.

In relation to clause 3-8 in the will, the testamentary paper contained the following observations:

"Rewards or Prizes for Essays: The universities of Scotland,

my native division of our illustrious isle, are deficient in prizes for the essays of the young students in literature; her deficiency in wealth, owing to the thinness of her population, will partly, perhaps chiefly, account for this: fortunately, that cause is rapidly giving way. I trust the present example (though but on a small scale) will be followed by others. I am well aware that the young people of Scotland have done very well without such incentives to exertion: still these are useful, and, if well directed, may assist materially in dispelling prejudices and false notions or theories, and in reaching what is true. They are also calculated to give encouragement to the students, and to afford them a pleasingly anxious and interesting sort of business suited to their dispositions. I confine these prizes to Edinburgh, in the first instance, not, however, excluding the literary students of any other university or place, at home or abroad, who choose voluntarily to try their pens, or strive for the prize, because the fund at first will not admit of annual prizes to more than one university. \*Should the fund increase, the prizes can be extended to the other universities of Scotland, England, and Ireland occasionally, according to circumstances."

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THE VICE-CHANCELLOR, upon this and the remaining parts of the will, delivered judgment as follows:

As to the second 50l. a year, that is to be given in prize medals for essays. I have no doubt that this also is valid according to the law of England. The institution is meant to take effect in Scotland, and must have effect given it in Scotland, if the law of Scotland will allow it. The same inquiries, therefore, mutatis mutandis, will be made with regard to that as with regard to the rest.

The next question is as to the residue, "if any." "The remainder of the said half (if any) shall be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works." Now, if the words "deserving literary men" imported what we call here a charitable intention, and if the profits of the manuscript works were also devoted to what we call charitable purposes, perhaps there might be no difficulty; but the provision made by him respecting the produce of his manuscript works devotes a portion of them to purposes not charitable, to the benefit of members of his family; and as the gift is alternatively "to deserving literary men, or to meet expenses connected with my manuscript works," as the trustees do not act, and as it is plain they were not intended to take beneficially, I am of opinion, that this clause 4-8,

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the section No. 4 in page 8, wholly fails; that, whatever it is which was intended to be given under these words, it is not disposed of. Therefore, subject to 50l. a year, if it can be given, to the literary man, the 40l. a year for the essays, the prizes, and a provision out of the five-fourteenths for the bread charity, the residue of this moiety must, in my opinion, go as in case of an intestacy.

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Then comes the provision as to the 10l. per cent. I have been throughout of opinion, and I remain of opinion, that that is a mere expression of a wish how property absolutely given should be employed by the person to whom it is absolutely given, which, if there be nothing more in it, is an ineffectual expression of intention. I am of opinion, therefore, that no partial intestacy is created by this direction in the will as to 10l. per cent. upon his income, but that the direction is to be treated as simply void, and, therefore, that the dispositions as to the bulk of his property under the deduction of 10l. per cent. are applicable to the bulk of his property without a deduction of 10l. per cent.

The Vice-Chancellor then directed various inquiries as to the extent to which the testator's real property in Scotland was affected by his will, &c.

1844. Aug. 7.

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> 1846. May 7. June 2.

Lord LYNDHURST, L.C. [ 400 ] YOUNGHUSBAND v. GISBORNE (1). (1 Coll. C. C. 400—402; S. C. 8 Jur. 750; affd. 15 L. J. Ch. 355—356; 10 Jur. 419.)

A trust for the support, clothing, and maintenance of an adult: Held to be a trust for his benefit generally, and to devolve to his assignees under the Insolvent Act, notwithstanding a provision to the contrary in the will by which the trust was created.

Francis Duckinfield, by his will, dated the 17th June, 1823, gave certain real estates to trustees, upon trust to levy and raise yearly, during the life of his brother John William Astley, one annuity or yearly sum of 400l.; and, in case of his death in the interval between any of the days therein mentioned for payment thereof, then a proportional part thereof up to the time of death. And he directed, that the annuity and proportional part aforesaid should be held by his said trustees, upon trust for the personal support, clothing, and maintenance of his said brother, so as not to be subject or liable to the claims of any person or persons to whom he should attempt to charge, \*anticipate, or otherwise encumber the same, nor to his creditors under a commission of bankruptcy or

[ \*401 ]

(1) In re Coleman (1888) 39 Ch. D. 443, 58 L. J. Ch. 226, 60 L. T. 127.

any Act for the relief of insolvent debtors, or to his own control, contracts, debts, or other engagements. And the testator declared, that the said annuity should be paid to his said brother himself from time to time, when and after the same should become due, until he should attempt to charge, anticipate, or otherwise encumber the same, or until any other person or persons might claim the same; and from and after such attempt or claim, the same should be applied by his said trustees, or some person under their direction, for or towards the personal support, clothing, and maintenance of his said brother, and for no other purpose whatsoever.

Younghusband v. Gisborne.

The testator died in July, 1835, and the trustees duly paid the annuity to John William Astley up to the 25th December, 1841.

On the 31st of May, 1842, John William Astley took the benefit of the Insolvent Debtors Act, and the plaintiffs, as his assignees, instituted this suit for the purpose of obtaining the annuity.

Mr. Wigram and Mr. Hallett, for the plaintiff, mentioned Lord v. Bunn (1).

Mr. Beales, for the insolvent, contended, that this was a mere personal trust for him; and, not being either an absolute interest or an interest for life, did not pass to the assignees. He cited Twopeny v. Peyton (2) and Godden v. Crowhurst (3).

(THE VICE-CHANCELLOR: If I create a trust for the maintenance and clothing of a male adult of sound mind, is it anything more than a general trust for his benefit?)

Mr. James Parker and Mr. Colvile, for the trustees.

In the course of the argument, the Vice-Chancellor noticed, that, in *Twopeny* v. *Peyton*, the gift was to a man who, at the time of the gift, was bankrupt and insane.

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## THE VICE-CHANCELLOR:

I wish to be understood as not giving any opinion, whether the two cases cited by Mr. Beales are, or are not, materially distinguishable from the present. If they are not so, then I must respectfully dissent from them. In the present case, I must say that I have no doubt. There is no clause of forfeiture, no clause of cesser, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually.

(2) 51 B. R. 301 (10 Sim. 487).

<sup>(1) 60</sup> R. R. 56 (2 Y. & C. C. C. 98). (3) 51 R. R. 332 (10 Sim. 642).

1844. CH. 1 COLL. C. C. 402; 1846. 15 L. J. CH. 356. [R.R.

YOUNG-HUSBAND GISBORNE.

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Considering the language of the will and the state of the authorities, I think it reasonable that the costs should be paid out of the fund.

[The insolvent appealed from the decision, as reported in 15 L. J. Ch. at p. 355.]

1846.

Mr. Wakefield and Mr. Beales appeared for the appellant.

[ 15 L. J. Ch. 356

Mr. Hallett, for the respondents.

The Lord Chancellor said that there was no dispute as to the general rule of law which was applicable to cases of this kind. Property might be given to a party to be enjoyed by him until he became bankrupt or insolvent; and if either of those events happened, the property might be given over to another party: but a person could not create an absolute interest in property, and, at the same time, deprive the party to whom that interest was given of those incidents which belonged to the ownership of the estate. In this case the legatee was entitled to the whole benefit of the The trustees were to pay the annuity to him until he property. made some alienation of it, or charge upon it, and it was then to be applied for his support, and for no other purpose. therefore, entitled to all the advantage which could be derived from the annuity; and the benefit of it would, consequently, pass to his assignees. If the cases which had been cited differed in principle from this decision, his Lordship must dissent from them. appeal must be dismissed; but, as the Vice-Chancellor appeared to think the question was a proper subject for an appeal, the costs must come out of the fund.

1844. July 13. FORD v. RUXTON (1).

(1 Coll. C. C. 403-409.)

[ 403 ]

A testamentary direction that all the testator's legacies shall be paid clear, means that they shall be paid clear of legacy duty.

A testator bequeathed to his servant C. a legacy of 6,000l. He afterwards gave to his servants who should have been living with him two years at the time of his death a year's wages: Held, that C., who had been living with the testator two years at the time of his death, was entitled to a year's wages in addition to the 6,000l.

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[By his will dated the 18th of June, 1840, John William Fowler made the following bequests:] "To my wife I give 20,0001. sterling. To my domestic Charles Wood I give 6,000l. sterling.

(1) In re Saunders [1898] 1 Ch. 17, 67 L. J. Ch. 55, 77 L. T. 450, C. A.

ervant Thomas Hopkins I give 500l. sterling. To my godson, the on of my friend John Whitcomb, I give 500l. sterling. To my codson, the son of my friend Patch, I give 500l. sterling. To my ervants who shall have been living with me two years at the time of my death I give each a year's wages, clear of anything due to hem from me. To Miss Penelope Hooper I give 500l. sterling. All the plate, furniture, pictures, books, linen, china, wines, carriages, horses, and other household things and property of all sorts and kinds, I leave to my wife absolutely; the legacies all to be paid clear; and all the rest of my monies, securities for money, and property of any kind, I leave to my friend John Patch, his executors, administrators, and assigns, upon trust and for the benefit of the objects of my settlement as he may think best."

FORD v. Ruxton.

The testator died in February, 1841, leaving no child of the marriage.

John Patch, the sole executor named in the will, having declined to take probate, the widow obtained letters of administration with the will annexed.

The bill was filed by the plaintiff, an infant, as one of the co-heirs-at-law and next of kin of the testator, against the widow, and Patch, and the other co-heirs-at-law and next of kin, and it prayed that the rights and interests of the plaintiff and the several defendants in the real and personal estate of the testator might be ascertained and declared, and for the usual administration accounts, &c.

After the original hearing, the widow married J. H. H. Ruxton, who was accordingly made a defendant.

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T 405 ]

The cause now came on for hearing for further directions, when [one question submitted to the Court was] whether the legacies given by the testator were free of legacy duty. Another point was also mentioned, viz., whether Charles Wood, whom the Master found to be one of the testator's servants who had been living with him two years at the time of his death, was entitled to a legacy of a year's wages, in addition to his legacy of 6,000l.

Mr. Wigram and Mr. Osborne, for the plaintiff.

Mr. Russell and Mr. Haig, for the defendant Mrs. Ruxton, [cited Gude v. Mumford (1), Louch v. Peters (2), and Barksdale v. Gilliat (3)].

Mr. Sydenham Clarke, for the defendant John Patch. \* \* \*

(1) 47 R. R. 436 (2 Y. & C. Ex. Eq.

(2) 36 R. R. 357 (1 My. & K. 489).
(3) 18 R. R. 139 (1 Swanst. 562).

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FORD v. Ruxton. Mr. Colvile, Mr. Blower, and Mr. Crutwell appeared for other parties.

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[The report of the judgment does not mention either of the points above referred to, but the following note of the decree shows that both questions were actually decided at the hearing.]

[ 408 ] [ \*409 ] \* Declare, that the legacies of the testator were payable free and clear of legacy duty. Declare, \*that the legatee Charles Wood became entitled to the legacy bequeathed to him as a servant who had been living with the testator two years at the time of his death, in addition to the legacy of 6,000l. bequeathed to him by the will.

1844: July 27.

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1847.

June 10, 11.

Lord

LYNDHURST,

L.C.

[ 409 ]

## THWAITES v. FOREMAN (1).

(1 Coll. C. C. 409-415; on appeal, 10 Jur. 483-484.)

A testator directed his trustees to stand possessed of the residue of his estate upon trust, in the first place, to pay what might be due under his covenant to J. S., and then, upon trust, set apart and invest a sufficient sum to satisfy certain annuities which he bequeathed by his will; and, in the next place, after making such investment as aforesaid, upon trust to pay the several pecuniary legacies bequeathed by his will. The assets were insufficient to pay all the legacies and annuities in full: Held, that the annuitants had no priority over the legatees in respect of payment.

HENRY THWAITES, by his will, dated the 25th July, 1889, appointed Robert Foreman and John B. Stapely the trustees and executors thereof, and gave to them the sum of 750l. each for their trouble in the execution of his will. And the testator, after making various specific devises and bequests, and after giving legacies to his several daughters amounting in the whole to about 23,000l., legacies to his grand-children amounting to about 8,000l., various other considerable pecuniary legacies, (including a legacy of 1,100l. to his housekeeper, which he directed to be paid within six months after his decease), then a legacy of 100l., and several legacies of 25l. and 10l. to his servants, (which he directed to be paid as soon as conveniently might be after his decease), and after devising a real estate in fee to Robert Foreman, and giving him a legacy of 950l., (which he directed to be paid within twelve months after his decease or sooner), gave and devised all his other real estates, (including an estate in Sussex), and all his monies, securities for money, goods, chattels, and personal estate, not thereinbefore specifically disposed of, unto and to the use of his said trustees, their heirs, executors,

<sup>(1)</sup> In re Hardy (1881) 17 Ch. D. 798, 50 L. J. Ch. 241, 44 L. T. 49.

dministrators, and assigns, upon the trusts following; (that is to say), as to the realty, upon trust to sell and convey the same to the purchasers thereof, (in the usual form). And as to all debts and sums of money due to the testator at his decease, upon trust to collect and get in the same as soon after his decease as the same conveniently might be, or as the same debts, according to the testator's \*custom in his lifetime, ought to be paid. And the testator declared and directed, that his trustees should stand and be possessed of the monies arising from the sale of his said residuary real estates, and such part of his personal estate as thereinafter directed to be sold, and also of the monies to be collected and got in as aforesaid, as the same several monies should respectively be received and got in, and also of all such parts of his residuary personal estate as should consist of ready money, upon the trusts following; (that is to say), by and out of the said several monies and funds, in the first place, to pay what might be due under the testator's covenant, or otherwise, to John Shore, and the representatives of his late brother Francis Shore, deceased, and also all the testator's funeral and testamentary expenses; and then upon trust to set apart or appropriate and invest in their names or name, upon Government or real securities, (but the testator expressed his preference of the latter), such a sum or sums of money as should be sufficient, by the interest or dividends thereof, to answer an annuity of 100l. per annum, which he the testator was bound to pay, to his brother John, (since deceased), if the same should remain payable at the time of his the testator's decease, an annuity of 30l. per annum, which the testator directed to be paid to his niece, the daughter of his brother John for and during the term of her natural life, and an annuity of 201., which the testator directed to be paid to Thomas Martin for and during the term of his natural life; and that such securities or monies so to be respectively appropriated or invested should, when the said annuitants should respectively die, fall into his the testator's residuary personal estate thereinafter disposed of; but with full power to his said trustees, if they should think proper, instead of making such investments as aforesaid, to purchase Government annuities to answer the said several annuities, or either of them: and, in the next place, after making such investments or purchase as aforesaid, upon trust that \*the trustees should, by and out of the said monies and securities, pay the several pecuniary legacies given by the testator's will, or which he might thereafter give by any codicil thereto, as and when the same should respectively.

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[ \*412 ]

under the directions of the will, or such codicil, become payable. And, as to the residue of the said several trust monies and securities which should remain after answering the trusts and purposes aforesaid, including the funds and securities (if any) to be set apart for answering such annuities as aforesaid, as the same should fall in thereto as aforesaid, and the accumulations, if any, to be raised and made during the first year after his the testator's decease as thereinafter mentioned, the testator did by his said will declare that the same should be in trust for the daughters living at his death of his two daughters Jane Wilcox and Charlotte Gastell, in equal shares and proportions.

The testator then declared, that the pecuniary legacies therein-

before given to his daughters should not be paid to them, but should be held by his trustees, upon certain trusts, for their benefit and that of their issue, and for that purpose he gave directions for the investment of those legacies in real securities, and declared at great length the trusts of such securities. He then directed, that all the several pecuniary legacies thereinbefore given, except such of them as he had thereinbefore directed to be paid at an earlier period, should be paid at the end of one year after his decease; and that they should not carry interest until the expiration of that period, and that the interest on the unpaid legacies should be computed from that time, at 4l. per cent. per annum. And he directed, that the legacies of 750l. each thereinbefore given to his trustees should be free of legacy duty. And he further directed, that, for the period of one year from the time of his decease, the dividends and interest of his residuary personal estate, and the rents and profits of his residuary real estates, or such parts thereof as might for the time being remain unsold, \*and the monies to arise from the sale of timber or underwood thereupon, or the surplus of such dividends and interest, rents, profits, and timber or wood monies, after paying or providing as thereinbefore mentioned for the said several annuities of 100l., 30l., and 20l., and such legacies as he had thereinbefore directed to be paid before the expiration of one year after his decease, should be accumulated at compound interest, by and in the names or name of his said trustees for the purposes of his said will, which accumulations should be added to and go along with his said residuary personal estate

The testator made a codicil to his will, the effect of which was merely to add one pecuniary legacy to those already bequeathed.

The testator died in January, 1840. The executors proved his will, and paid all his debts. They also retained their own legacies

of 750*l*. each, paid the legacies to the servants in full, and made various payments on account of the other legacies, exclusive of the annuities. These payments amounted to upwards of 6,000*l*.

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FOREMAN.

The plaintiff, Elizabeth Thwaites, to whom the 30*l*. annuity was bequeathed, received from the executors on account of her annuity three several sums of 30*l*., 15*l*., and 10*l*.; but after March, 1842, the executors declined making any further payment to her, on the ground, as they alleged, of an unexpected deficiency of assets.

The plaintiff therefore brought her bill against the executors, and the several persons interested under the will, praying accounts of the real and personal estate of the testator and of his debts, and that the residuary personal estate might be ascertained and might be applied in payment of the legacies and annuities, and that, if the same should be insufficient for that purpose, then that the defendants the executors might under the circumstances be deemed to have admitted assets, and might be decreed to make good the deficiency.

The executors, by their answers, stated, that, when they retained their legacies of 750l., they fully expected that the testator's assets would ultimately be sufficient for payment of all his legacies in full, but that they were disappointed in their expectations, from not being able to sell to advantage the Sussex estate, which, though a fine estate, and consisting of upwards of 1,700 acres, was covered with young timber unfit for present use, and was, therefore, difficult to sell. They alleged, that they were unable to state as to their belief, or otherwise, whether the real and personal estate of the testator was insufficient to pay and satisfy his just debts, funeral and testamentary expenses, and legacies, or whether the various legatees and annuitants under the will would have to abate proportionably, though they trusted, that, if proper care were used in the sale of the remaining real estates, that would not prove to be the case. They insisted on a moral, if not a legal right to retain their legacies of 750l., on the ground that those legacies were given for care and trouble, and that their doing so did not amount to an admission of assets. Upon taking a balance of receipts and payments as stated in the schedules to their answers, it appeared that they had in hand 1,000l.

The cause now came on for hearing.

Mr. Russell and Mr. Glasse, for the plaintiff, contended, first, that, upon the true construction of the will, the annuitants of 30l. and 20l., one of whom was the plaintiff, were entitled to priority over all the other legatees. Secondly, that, there being an

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THWAITES v. FOREMAN. admission of assets by the defendants, the plaintiff was entitled to an immediate decree for payment of her annuity, notwithstanding that the bill prayed that the executors might be made personally liable only in the event of a deficiency of assets after accounts taken: Rogers v. Soutten (1), Woodgate v. Field (2).

[414] The Vice-Chancellor declined to make an immediate decree for the plaintiff, and called upon the counsel for the executors to address themselves only to the first point.

Mr. Anderdon and Mr. Goodere, for the defendants the executors:

In Beeston v. Booth (3), where the testator directed his executors and trustees, after payment of his debts and funeral expenses, in the next place to pay three pecuniary legacies, and afterwards to raise and set apart three other legacies, Sir John Leach held, that there was no priority between the two sets of legatees. So, here, the words "in the first place" &c. are merely words of enumeration, and not strong enough to show an intention to give priority to any of the legacies.

(The Vice-Chancellor referred to Attorney-General v. Robins (4).)
This case is distinguishable from that, and from Stammers v. Halliley (5).

Mr. Tripp and Mr. C. Roupell appeared for other parties.

Mr. Russell, in reply.

#### THE VICE-CHANCELLOR:

Primâ facie, all bequests stand on an equal footing, and it lies upon those who assert the contrary, to prove it.

It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish, that it was the intention of the testator that the bequests should not stand upon an equal footing.

Now, in considering whether such was the intention of this testator, we must recollect that words that are merely introductory cannot, generally, by themselves be held to direct any order of payment; we should also bear in mind an apposite observation of Sir John Leach, (I think contained in *Beeston* v. *Booth*), that, unless the testator \*tells you himself, that he believes the assets to be insufficient, you must attribute to him the notion that he has

(1) 44 R. R. 289 (2 Keen, 598).

[ \*415 ]

- (2) 62 R. R. 81 (2 Hare, 211).
- (5) 56 R. R. 2 (12 Sim. 42).

(4) 2 P. Wms. 23.

(3) 20 R. R. 287 (4 Madd. 161).

THWAITES

FOREMAN.

issets sufficient to satisfy all the bequests that he makes (1); and, f you attribute that notion to him, you cannot well infer, that he ntended to make provision for an order of payment applicable only to the case of the assets being insufficient. I was much struck with the words of this will when I first read them. considered them, and looked at several of the authorities, and my impression is, that the words are not strong enough to establish the priority which has been contended for, especially when the parallel expressions in Beeston v. Booth are considered.

It is perhaps, also, not altogether unworthy of notice, though the observation may be slight, that the clause in the latter part of the will, in which the testator directs the accumulation of the surplus dividends, rents, and profits for one year after his decease, classes the annuities with those legacies which are payable within that time.

Upon the whole, I think, that, with respect to the question of priority, the utmost effect that can be given in favour of the plaintiff to the language of the will, on which she relies, is to say, that it creates a doubt as to the intention; but this, as I have already said, is not sufficient to change the general rule as to the order of bequests.

[From this decision the plaintiff appealed. The appeal was heard on June 10, 11, 1847, as reported in 10 Jurist, 488.]

[After disposing of a question which is not material to this report, the Lord Chancellor said:]

1847. June 10, 11.

As to the main question, that of priority, I must be quite satisfied [  $^{10}$  Jur.  $^{484}$  ] that it was the intention of the testator that the plaintiff was to have a preference: unless I am so, I cannot consider that it is established. I think the directions in the will amount to no more than this: "First, I direct so and so; secondly, I direct so and so; next I direct the payment of legacies; and then, after all this, my executors are to divide the residue." This does not establish a priority. do not think much stress either is to be laid on what Mr. Parker has relied on, viz., the fact that the testator classes the annuities The case, then, is not made out to show that the with debts. testator intended to give a preference to the plaintiff over the other legatees; and unless I am satisfied on this point, I should not be justified in allowing the plaintiff's claim. I concur, therefore, with the Vice-Chancellor, and the appeal must be dismissed with costs.

<sup>(1)</sup> Sæpe de facultatibus suis, amplius quam is, sis est, sperant homines. lib. 1, tit. 6, sect. 3.)

1844. July 12, **25,** 27. Aug. 8.

KNIGHT BRUCE, V.-C. [ 416 ]

# HARRIS v. DAVIS(1).

(1 Coll. C. C. 416-428; S. C. 9 Jur. 269.)

A testator, by a will made since the stat. 1 Vict. c. 26, after directing payment of his debts and bequeathing several specific articles of plate to his sister L., desired that all his other plate, jewellery, books, pictures, and other property, except freehold and leasehold property, should be sold, and the produce, after deducting funeral and other expenses, be divided in equal parts amongst L., M., N., O., and P. He then directed that his freehold house and his leaseholds (some of which were held for years, and others for years determinable on lives) should be kept in hand and let to the best advantage, and the produce be divided every half-year to the above-named L., M., N., O., and P., or to their lawful heirs; and, in case of there being no heir, the share or shares to be divided in equal parts among the surviving legatees. The testator, at his death, left L. his heiress-at-law and sole next of kin. M., N., O., and P. were not related to L., but were related to and capable of inheriting from each other. M. died unmarried in the testator's lifetime: Held, first, that M.'s share of the residuary personal estate lapsed for the benefit of the next of kin. Secondly. that M.'s share of the freehold property did not lapse, but went to the surviving devisees; the words "heir" and "lawful heirs" referring to heir of the body, and "or" being construed "and." Thirdly, that M.'s share of the leaseholds for years lapsed and fell into the residue, the words "there being no heir" referring to an indefinite failure of issue, and the word "surviving" meaning "other."

A testator, by a will made since the stat. 1 Vict. c. 26, bequeathed the residue of his personal estate and certain freehold and leasehold estates in equal shares to L., M., N., O., and P. In a subsequent part of his will be bequeathed to H. one-half of the legacy named to each of the other legatees; (that is to say), one-half what his brother M. ought to receive. By a codicil the testator declared as follows: "I revoke all that part written in my former will which leaves a legacy to H., written in my will on the 32nd and 33rd lines:" Held, that, by force of this revocation, the will was to be read as if the gift to H. were not in it; consequently, that such revocation enured to the benefit of the other devisees and legatees

MYER SOLOMON, by his will, dated the 30th August, 1838, directed his executors, after his funeral expenses and lawful debts were paid, to distribute certain money to the poor, and after bequeathing two parchment scrolls of the (Mosaic) law written by him, together with their silver appendages, to the Synagogue in St. Alban's Place, proceeded with his will as follows: "I do bequeath to my beloved sister Phœbe Levy all my furniture, wearing apparel, family portraits, china, silver tea and milk pot, sugar basin, twelve tea and twelve table spoons, two pair of silver salts, soup ladle, a pair of old plain silver candlesticks. I desire that my other plate, jewellery, books, pictures, remaining Hebrew scrolls not my writing, and other property not here explained, except freehold or leasehold property, to be sold, and the produce, after deducting

<sup>(1)</sup> Sykes v. Sykes (1868) L. R. 3 Ch. 301, 37 L. J. Ch. 367.

funeral and other expenses, as expressed above, to be divided in equal \*parts to names as hereby follow: To my dear sister Phœbe Levy, Myer Davis, Frederick Davis, Sarah Davis, Rachel Davis, Esther Davis, children of Charles and Elizabeth Davis, Moses Moses son of Smaycha and Polly Moses, Sarah Harris, Samuel Harris, Senicha Harris, children of Henry and Elizabeth Harris; but to the minors above named, their shares to be to interest until they become of age; or should they marry before that period one of our holy religion, it shall then be in the power of my executors to pay them their share as above described. The freehold house situate in Little Queen Street, Westminster, as also my leaseholds, under the Crown or otherwise, to be kept in hand, and be let to the best advantage, and the produce to be divided every half-year to the above-named Phœbe Levy, Myer Davis, Frederick Davis, Sarah Davis, Rachel Davis, Esther Davis, Moses Moses, Sarah Harris, Samuel Harris, Senicha Harris, or to their lawful heirs, and in case there being no heir, then the share or shares to be divided in equal parts amongst the surviving legatees. And I do hope that my legatees and their heirs will not depart from and quit our holy faith as becomes a good Jew, so long as he, she, or they shall be fully entitled to this my bequest; but if any of the above-named or their heirs shall be proved satisfactorily to the executors or trustees for the time being as having departed from our holy Mosaical religion, in that case it shall be the duty of the executors or trustees for the time being to withhold his, her, or their shares or dividends, and pay the same in equal parts to the others as named above remaining and continuing in holy faith. I do also bequeath unto Henry Moses, at present in America, one-half of the legacy named to each of the other legatees, (that is to say), one-half of what his brother Moses Moses may receive." The testator then appointed Charles Davis and others to be his executors. The testator made a codicil to his will, dated the 4th \*July, 1840.

which was partly in these words: "In this codicil I revoke all that part written in my former will dated 9th Elul, 5598, answering to the English month 30th August, which leaves a legacy to Henry Moses, now in America, written in my will on the 32nd and 33rd lines. I also bequeath unto my good friend Charles Davis, for his

great attention to me, 50l., &c. Done this 4th day of July, answering to the 12th day of Thamu, in the year 5600 of the Hebrews."

CODIC M D.

Moses Moses, one of the legatees named in the will, died, a

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HARRIS r. DAVIS. bachelor, in the lifetime of the testator, that is to say, on the 16th November, 1840.

The testator died on the 30th December, 1840, leaving Phabe Levy, his sister and heiress-at-law, and also his sole next of kin.

The bill was filed by the children of Henry and Elizabeth Harris, against the executors, and against Phœbe Levy and the children of Charles and Elizabeth Davis; and it prayed that the trusts of the will might be carried into execution.

The cause now came on for hearing, for further directions. It appeared from the Master's report that the leasehold estate consisted of two messuages and land in Pall Mall, held for a term of ninety-nine years from July, 1827, and a leasehold house and garden in Kennington, held for a term of ninety-nine years from January, 1848, determinable on the life of Prince George of Cambridge. The Master found that none of the legatees had departed from the religion described by the testator as the holy Mosaical religion.

It was stated at the Bar, and not contradicted, that Elizabeth Davis, Polly Moses, and Elizabeth Harris were sisters of the testator's wife.

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The questions discussed were, what, in the events that had happened, had become of Moses Moses's share, first, in \*the residuary personal estate; secondly, in the freehold estate; thirdly, in the leaseholds (1); and, also what effect the revocation of the legacy to Henry Moses by the codicil had upon the interests of the other legatees.

Mr. Chandless and Mr. Hore, for the plaintiffs, and Mr. Wigram, Mr. James, and Mr. Drewry, for defendants in the same interest, said that they would not press the question as to Moses Moses' share of the residuary personal estate, which probably the Court would consider to have lapsed for the benefit of the next of kin. But they submitted that his share of the freehold (the whole fee-simple in which was well devised by means of the devise of the rents) devolved upon his death, either to his heirs (living at his death) by substitution, or in default of such heirs to the surviving devisees of the freehold: [Gittings v. M'Dermott (2), Loreday v. Hopkins (3)]; and that his interest in the leaseholds for years also went to the same devisees. \* \*

<sup>(1)</sup> The question as to the leaseholds held for years determinable on lives was compromised.

<sup>(2) 39</sup> R. R. 139 (2 My. & K. 69).

<sup>(3)</sup> Ambl. 273.

Mr. Anderdon and Mr. Evans, for the defendant Phœbe Levy, [upon the first point cited Skrymsher v. Northcote (1), Lloyd v. Lloyd (2), Attorney-General v. Johnstone (3), (supported by Lord Eldon, in Legge v. Asgill (4)), Ray v. Adams (5)].

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Upon the second point, the share of Henry Moses, both in the realty and personalty, does not in the events that happened devolve to the residuary devisees and legatees, but is undisposed of: Baker v. Hall (6), Creswell v. Cheslyn (7), Mortimer v. West (8). The case of Creswell v. Cheslyn decides that the revocation of a bequest of part of the residue is the same in effect, as regards the other residuary legatees, as the lapse of that part.

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The Vice-Changellor stated his opinion to be that the share of Moses Moses in the residuary personal estate had lapsed. He likewise intimated an opinion that the share of the same legatee in the chattel leaseholds had lapsed unless saved by the doctrine contained in Forth v. Chapman (9), united with the 29th section of the Will Act; but that his share in the freehold estate had not lapsed. Judgment, however, was reserved upon the last two points, and also upon the question of the revocation of the legacy to Henry Moses.

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#### THE VICE-CHANCELLOR:

Ang. 8.

The questions in this case are questions of construction upon the will and codicil made respectively in August, 1838, and July, 1840, of Myer Solomon, which, so far as it is material to state them, are thus: (His Honour here read the material parts of the will and codicil, and, after stating that Moses Moses died in the testator's lifetime, without leaving issue, and observing, that the case of Seaward v. Willock, which had been cited in argument, seemed to have no application to the present case, proceeded thus:)

I have already expressed my opinion that the share of the testator's residuary personal estate, which Moses Moses would have taken, had he survived the testator, has lapsed. I think that the testator cannot be considered to have intended to affect it by the clause beginning "And in case there being no heir."

- (1) 18 R. R. 142 (1 Swanst. 566).
- (2) 55 R. R. 59 (4 Beav. 231).
- (3) Ambl. 577.
- (4) 24 R. R. 51 (T. & R. 268).
- (5) 41 R. R. 58 (3 My. & K. 237).
- (6) 8 R. R. 366 (12 Ves. 497).
- (7) 2 Eden, 123.
- (8) 29 R. R. 104 (2 Sim. 274).
- (9) 1 P. Wms. 663.

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With regard to the freehold house, I am of opinion that the share of Moses Moses has not lapsed, and that the whole of the freehold house belongs to the other nine devisees of it equally in tail, subject to the question as to Henry Moses, which I shall mention. It is admitted, that eight of them are related to each other, and capable of inheriting from each other, and were related to Moses Moses, \*and capable of inheriting from him; and, though it is said, and I suppose accurately, that the testator's sister Phæbe Levy was not related to Moses Moses, and is not related to either of the persons who with her are the surviving devisees, I am, from the relationship between the eight and Moses Moses, of opinion, upon the authority of Webb v. Hearing (1), Tyte v. Willis (2), Morgan v. Griffiths (3), and various other decisions, as well as the reason of the thing, that the word "heir," in the clause beginning "and in case there being no heir," must be taken as meant in the sense of "heir of the body," or "issue," and as showing that by the words "their lawful heirs," in the passage "or to their lawful heirs." the testator meant "the heirs of their bodies,"-a construction not, I think, prevented by the undoubted authority of Tilbury v. Barbut (4), and other cases of the same class,—nor can the word "or" in this passage be construed otherwise than as "and"-for which Wright v. Wright (5), Read v. Snell (6), and numerous other decisions form amply sufficient authority. The clause therefore beginning "and in case there being no heir" has the effect of carrying Moses Moses' share of the freehold house, as I have said, to the other nine devisees in tail.

With regard to the leasehold property, which I understand to be chattel leasehold, for a term or terms exceeding twenty-one years, and not determinable on lives, I have had some doubt whether it might not be possible by means of the word "surviving," or from the joint operation of the late Will (7) Act and the doctrine of Forth v. Chapman, to hold that Moses Moses' share of it belongs also to the other nine devisees. But, upon consideration, I think that such a construction of this will cannot be maintained, and that his share of the leasehold has lapsed. It seems to me \*that the words "there being no heir" must be held to point to an indefinite failure of issue, and that this is one of the cases in which the word "surviving" must be read "other."

(1) Cro. Jac. 415.

<sup>(2)</sup> Ca. t. Talb. 1.

<sup>(3)</sup> Cowp. 234.

<sup>(4) 3</sup> Atk. 617.

<sup>(5) 1</sup> Ves. Sen. 409,

<sup>(6) 2</sup> Atk. 645.

<sup>(7)</sup> Sic.

In alluding, as I just now did, to the Will Act, I meant to refer articularly to the 29th section. But there is another section, the 4th, upon which I doubted for some time, whether the lapse of foses Moses' share of the leasehold might not be held to be briated. I think, however, that, unless there is authority for so nterpreting the 24th section, (and none has been mentioned), I cannot venture to do so. I may observe that the republication of the will by the codicil, has not been argued in the present case to affect the question of lapse as to Moses Moses' share of the leaseholds.

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Upon this part of the cause, among the authorities into which I have looked, besides Nicholls v. Skinner (1), Keily v. Fowler (2), Wilmot v. Wilmot (3), Barlow v. Salter (4), Massey v. Hudson (5), and Candy v. Campbell (6), has been a case of Mackinnon v. Peach in 2 Keen (7). With reference to that case, I may, perhaps, be allowed to say, that I have always thought, that if a testator possessed of a specific personal chattel, such as plate, or a chattel real, liable to the same considerations, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime, without issue, does not enable B., though surviving the testator, to take under the will, but causes a lapse; nor am I the only Judge of the Court of Chancery by whom that opinion is entertained (8).

[After making some further observations in support of that opinion, which is no longer tenable, the Vice-Changellor continued as follows:]

The only remaining question is, I believe, as to the effect of the codicil upon what the will had given to Henry Moses. I think that it revokes the entire gift to Henry Moses whether consisting of realty or personalty or both; but does that revocation operate for the benefit of Phæbe Levy, who is the heiress-at-law and next of kin, or for the benefit of herself and others? This point has appeared to me to be one of some difficulty. The case of Creswell v. Cheslyn clearly binds the Court; and, if the present case is not substantially distinguishable from it, is decisive. But I am of

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(8) But that opinion cannot now be maintained, for the Court of Appeal, expressly dissenting from this dictum, has decided that the failure of the earlier gift accelerates the gift over: In re Lowman [1895] 2 Ch. 348, 64 L. J. Ch. 567.—O. A. S.

<sup>(1)</sup> Pre. Ch. 528.

<sup>(2) 3</sup> Br. P. C. 299, ed. Toml.

<sup>(3) 6</sup> R. R. 196 (8 Ves. 10).

<sup>(4) 17</sup> Ves. 479. Stated 30 R. R. 851.

<sup>(5) 16</sup> R. B. 158 (2 Mer. 130).

<sup>(6) 37</sup> R. R. 196 (2 Cl. & Fin. 421).

<sup>(7) 44</sup> B. R. 283 (2 Keen, 555).

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opinion, that it is distinguishable. There the will, giving the residue to two sons and a daughter of the testator equally, did not anywhere profess to give any possible interest in the daughter's share to either of the sons. The codicil revoking the gift to her, having been held by the Lord Chancellor and the House of Lords not to contain any expression of intention in favour of the sons or any person as to the share so withdrawn from her, it was impossible consistently with that view to say, that the sons could take what was never given to them. To have read his will as if the gift to her had been struck out of it, would not have had the effect for which the sons contended, without farther altering its language. In the present case, property composed of freehold and leasehold and of the residuary personal estate was given by the will wholly to ten persons equally: but, by a subsequent clause in the same instrument, a distinct clause, an unequal share \*in the same property was given to an eleventh person, Henry Moses. The will is so constructed as that, read revoked that gift to him. with the total omission of the revoked gift, it gives the property entirely to the ten other persons, without farther altering or departing from its language. The provision for Henry Moses, being considered as struck out of the will, every thing is, on the face of the will, manifestly disposed of. This kind of question must, in each instance, not concluded by authority, be a question of intention upon the particular instrument to be construed. In a case substantially the same as Creswell v. Cheslyn, I should be bound to hold, and probably, if not bound, should from my own judgment hold, that there was a lapse. But I repeat that I do not view this case as substantially identical with Creswell v. Cheslyn, or, of necessity, to be governed by that decision. When the testator says by the codicil, "In this codicil, I revoke all that part written in my former will, dated 30th August, which leaves a legacy to Henry Moses, now in America, written in my will on the 32nd and 33rd lines," he appears to me to direct in terms sufficiently plain, that his will shall take effect, as if the clause in favour of Henry Moses had not been inserted in it. I have no doubt of his intention. which may, I think, be judicially upheld, consistently with the authority, high in every respect, and as I have said absolutely binding on the Court, to which I have referred.

Mr. Wigram said that this case might be reasonably argued to stand on a footing not materially different from that of a complete gift by a will, the gift partially revoked by a first codicil, and the

irst codicil itself wholly revoked by a second codicil, which would eave the gift as it stood upon the will. That is very much the view that I also take of it. My opinion, I repeat, is, that, in the present case by reason of the codicil, the will is to be read as if the gift to Henry Moses were not in it; and that, consequently, subject only to the partial cause lapsed by the death of Moses Moses, the other nine original devisees and \*legatees take as such without any diminution by reason of the gift to Henry Moses.

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Declare, that the share of the general personal estate intended for Moses Moses lapsed for the benefit of the next of kin of the testator. Declare, that the share of the freehold house intended for Moses Moses did not lapse, but passed to the other devisees of the same as tenants in common in tail. And, the defendant Phœbe Levy consenting, declare, that the share intended for Moses Moses of the testator's leasehold house, held for a term of years determinable on the life of Prince George, did not lapse, but passed under the will of the testator to the other legatees of the testator's leasehold estates as tenants in common. Declare, that the share intended for Moses Moses of the testator's other leasehold estates lapsed; and that the share which so lapsed fell into the residue of the testator's personal estate, and passed under the general bequest of the same, contained in the will. Declare, that the revocation which the testator, by his codicil, made of that part of his will which leaves a legacy to Henry Moses, enured to the benefit of the other devisees and legatees of the testator.

### CHURCHILL v. MARKS.

(1 Coll. C. C. 441-448; S. C. 14 L. J. Ch. 65.)

1844. Nov. 9, 18.

A limited prohibition against alienation of a contingent reversionary interest during the period of such contingency, accompanied by a gift over, is valid, and a petition by the reversioner for relief under the Insolvent Debtors Acts may operate as a forfeiture of his reversionary interest (1).

KNIGHT BRUCE, V.-C. [ 441 ]

The will of James Churchill, dated the 1st January, 1830, was partly as follows: "I give and bequeath to my brother George Churchill, for his natural life, the interest or dividends from 5,000l. New 3l. 10s. per cent. Government stock, which now pays a dividend

(1) But the attempt to impose a restriction against alienation for a limited period of time upon a devise in fee simple has been held to be

repugnant to the devise, and therefore void: In re Rosher (1884) 26 Ch. D. 801, 53 L. J. Ch. 722, 51 L. T. 785. —O. A. S.

v. Marks.

[ \*442 ]

CHURCHILL at the Bank of England of 1751.; this said dividend, or any other dividend that Government may pay, shall be paid to him halfyearly, if convenient, for and during his natural lifetime. never sell or part with this said interest or dividend in any way whatsoever during his lifetime, until it is become \*due; and if he, the said George Churchill, should die or become a bankrupt, then this said dividend shall be paid to his said wife, if she shall be then living, for her life; she to lay it out for the good of his children: but if she should be the longest liver, and get married again, then she shall have nothing more to do with the money; the executors or executor shall then have full control over the money, and shall lay it out as they shall think best for such of the children as remain under age; and when the youngest child becomes of the age of twenty-one years, then the said 5,000l. stock shall be sold, and the money shall be then equally divided between such of the said George Churchill's children that shall be then living, equally share and share alike. No one of the said children shall be allowed, or shall ever sell or part with, his or her share or interest in this said money until it shall be divided. If on proof of any one or more of them having done so, then his or her share will from that time become the property of the other children; and when said stock shall become sold, his or her share shall be divided between those other children who shall not have sold: this said stock to stand in the names of my executors; and if Government should reduce this said interest, then it must stand in the reduced stock."

The testator died in 1831.

George Churchill died in 1836, leaving a widow, who died in 1843, and six children, of whom four only were living in January, 1844, when the youngest attained the age of twenty-one; namely, George, James, William, and Maria. Of these, George, William, and Maria, received from the plaintiffs, who were the representatives of the surviving executor and trustee of the testator's will, their respective fourth parts of the 5,000l. stock. The plaintiffs, however, under the following circumstances, declined to dispose of the share of James without the sanction of the Court.

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It appeared that, on the 27th July, 1840, James Churchill was arrested for debt at Stoke Newington, at the suit of the defendant Robert Marks; that, on the 31st of the same month, he was removed by habeas corpus and committed to the Queen's Bench Prison, and was there detained at the suit of Marks and another creditor; and that, on the 7th August, 1840, he being in actual stody within the walls of the prison, presented his petition to the Churchill solvent Debtors Court, under the stat. 1 & 2 Vict. c. 110, stating mongst other things) that the petitioner was willing that all his al and personal estate and effects should be vested in the proisional assignee, according to the provisions of the Act, and praying at he might be discharged.

MARKS.

On the 8th August, 1840, the Insolvent Debtors Court made the sual order for vesting the real and personal estate of the insolvent n the provisional assignee of that Court.

On the 3rd September, 1840, the insolvent, in pursuance of the Act, signed a schedule containing, amongst other particulars, an account of his estate and effects in possession, reversion, remainder, or expectancy, and in that schedule he stated, that, under the will of James Churchill his uncle, he should be entitled, as he believed, equally with his brothers and sisters to one-sixth part or share of 5,000l. New 3l. 10s. per cents., then standing in the name of William Churchill, of Upper Islington, gentleman, but which he, under the will, had no power to assign.

This schedule was, on the 4th September, filed in the Insolvent Debtors Court. On the 27th February, 1841, that Court adjudged the insolvent to be entitled to the benefit of the Act, and ordered him to be discharged, and he was discharged accordingly. And on the 29th \*March, 1841, the same Court appointed the defendant Marks assignee of the estate and effects of the insolvent.

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The object of the bill was, to obtain the opinion of the Court as to whether the share of James belonged to the defendant Marks, as the assignee of James Churchill under the Insolvent Act, or to the other defendants, who were Lucy Churchill, the widow and executrix of George Churchill the younger, William Churchill, and Andrew 8. Flintoff, and Maria his wife, formerly Maria Churchill, James Churchill the insolvent being out of the jurisdiction.

Mr. Simons, for the plaintiffs, submitted that the decision in the present case must follow that of Brandon v. Aston (1). He, however, called the attention of the Court to the circumstance, that the insolvency of James Churchill took place in the lifetime of George Churchill's widow, (the widow not having married again), and before the youngest of the children attained twenty-one.

(THE VICE-CHANCELLOR: I am disposed to think that Brandon V. Aston is not wrong.)

(1) 60 R. R. 11 (2 Y. & C. C. C. 24).

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Mr. Koe and Mr. Tripp, for the defendant, the assignee:

The questions are, first, whether the acts of the insolvent are within the terms of the condition imposed by the will against alienation; and, secondly, whether that condition is valid. In Brandon v. Aston the expression was "attempt to mortgage, encumber, or anticipate," which is more extensive than anything contained in this will. The words here, as applied to the children, are "sell or part with," which words have reference to an actual sale or disposition by the party himself, and do not apply to alienation by operation of law. Presenting a petition to the Insolvent Debtors Court is clearly not a sale, nor it is a parting "with the interest; for if the insolvent had died between the time of presenting the petition and the vesting order, could it have been claimed by the assignee? Hibbert v. Carter (1).

Secondly, the clause in restraint of alienation is void. In the cases in which a clause of that sort has been supported, the party has taken an interest for life only. But when James Churchill took the benefit of the Insolvent Act, he had an absolute vested interest, although liable to be devested in the event of his dying before the youngest child of his father attained twenty-one. The gift to the children is not contained merely in the direction to pay. There is an absolute gift of the stock to trustees for the benefit of the tenant for life, and those in remainder. The interests, therefore, of the children being absolutely vested, though liable to be devested, a restraint on the alienation of such interests would be repugnant and void: Litt. sections 360, 361; Co. Litt. 206 b, 222 b, 223 a; Ross v. Ross (2).

Mr. Amphlett, for the defendant Lucy Churchill.

Mr. Wigram and Mr. Chichester, for the other defendants.

In the course of the argument, an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime, the estate shall shift to B., is valid.

#### THE VICE-CHANCELLOR:

My present impression is, that in this case there was a "parting with" the property within the meaning of that expression in the

(1) 1 R. R. 388 (1 T. R. 745).

(2) 20 R. R. 263 (1 Jac. & W. 154).

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will. The next question is, whether the clause in the will restraining Churchill alienation \*is effectual. Assuming that at the time of the vesting order the mother was alive, and was still the widow of George Churchill, and assuming that one of the children entitled contingently was a minor at that time. I think that the interest of the insolvent in the capital was, at that time, both contingent and reversionary. If there is any gift of the capital to the children, it is only in these words, "and when the youngest child becomes of the age of twenty-one years, then the said 5,000l. stock shall be sold, and the money shall be then equally divided between such of the said George Churchill's children as shall be then living, equally share and share alike." The gift, therefore, such as it was, was contingent; the widow, at the time of the vesting order, was entitled to the income; and, if the insolvent had died before the youngest child attained twenty-one, there would have been nothing coming to his estate. As at present advised, therefore, I am inclined to consider the clause against alienation valid. I will not, however, finally dispose of these questions now; and upon the latter point, I wish to hear further argument.

### THE VICE-CHANCELLOR:

Nov. 18.

I have considered this case since Saturday week. The language of the will of the testator James Churchill is more brief and restricted than that which I had to construe in Brandon v. Aston. But I remain of opinion, that by means of the petition presented by the insolvent, the vesting order upon it, and his discharge so procured, he "parted with" his interest, if any, under the will, within the meaning of that expression contained in it.

It has been stated and admitted, that these proceedings took place after the deaths of the testator and the insolvent's father George Churchill, while the insolvent's mother was living the widow of his father, and while one of the living children of the insolvent's father mentioned in \*the will was a minor. It has not been suggested that the widow did not duly perform the duty imposed upon her by the words "she to lay it out for the good of his children," words which, I think, certainly cannot be considered as extending beyond the income during her life. And, except such interest as the insolvent might have in the application of that income during her life, he had not, under the circumstances which I have mentioned, according to the true construction of the will, acquired, in my judgment, any present or any vested interest in any

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part of the fund in question at the time of presenting his petition, or at the time of the vesting order. Perhaps, however, these points (upon which, my opinion being against the assignees, the counsel for the other parties need not argue them) do not, so decided, conclude the question in dispute against the assignees, either as to participation in the income during the widow's life (she is, I understand, dead), or in the capital after her death. I collect, that the child, or one of the children, under age at the time of the vesting order, afterwards attained majority, and that there is not any minor child now living. I repeat, that I do not consider Brandon v. Aston to have been wrongly decided.

His Honour then called upon the counsel for the assignees to argue the question as to the validity of the clause restraining alienation.

Mr. Koe and Mr. Tripp then argued that that clause was inconsistent with the clause containing the gift to the children, and was, therefore, repugnant and void. Admitting that the interest of the insolvent was contingent only, yet, with regard to the doctrine as to restraint upon alienation, the case was the same, whether there was a contingent absolute interest, or a vested absolute interest: Bradley v. Peixoto (1), Brandon v. Robinson (2), Green v. \*Harvey (3).

(THE VICE-CHANCELLOR: Bradley's case was an absolute interest in possession. The case at the Bar is a contingent reversionary interest.)

#### THE VICE-CHANCELLOR:

Whatever might have been thought of this point a century and a half ago, I apprehend that decisions uniformly recognised as now binding have in effect established that a clause, worded as this clause is worded, is valid. They do not, perhaps, decide it in terms, but they do in spirit. Construing, therefore, this will as I do, I must hold that the clause of forfeiture, or shifting clause, is good.

Mr. Koe then applied to the Court to have the costs of the

<sup>(1) 4</sup> R. R. 7 (3 Ves. 324).

<sup>(3) 58</sup> R. B. 127 (1 Hare, 428).

<sup>(2) 11</sup> R. B. 226 (18 Ves. 429).

signee paid out of the testator's estate, suggesting that he would Churchill able to get no costs out of the insolvent's estate.

MARKS.

The Vice-Chancellor, after referring to Brandon v. Aston, said, nat he should make no order as to the assignee's costs.

It being admitted that the presentation of the petition, the vestag order, and the discharge under the Insolvent Act, took place uring the life of the widow, and while she was the widow of the estator's brother George Churchill, and while there was living a hild of the widow, a minor, which minor afterwards attained the ige of twenty-one, declare that the share of the insolvent in the 5,000l. New 3l. 10s. per cent. Bank Annuities, went over to the other children of the said George Churchill who were living when the youngest attained twenty-one.

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(1 Coll. C. C. 449-476.)

By the marriage-settlement of W., an annuity of 8001. Jamaica currency was settled on his wife for life, and was subsequently charged on an estate of W., in that island. W. afterwards made his will, whereby he charged his estates in a certain manner with the payment of his debts; and then, after reciting the settlement, and that he was desirous of making a larger provision for his wife, he gave her a rent-charge of 2,000l. per annum, for life, which he charged on the R. estate, and which was to be in lieu of all dower and thirds. Upon the death of W., the widow released her title, if any, to dower, and elected to take the 2,000l. annuity, and payments were made to her on account of it, by the executors. W., however, being at his death largely indebted to the firm of W. & Co., of which he was a partner, that debt was paid by his executors by means of a mortgage of the R. estate, and by the terms of the mortgage-deed the mortgagee was to hold the estate, subject to the several annuities given by the will of W., but freed and discharged of and from the debts and legacies charged upon the premises by the will, and of and from all other charges and incumbrances whatsoever. The assets of W. turned out to be insufficient for payment of all his debts: Held, that a portion of the payments made by the executors to the widow must be ascribed to the annuity of 800%. Jamaica currency, and were to that extent good, but that the residue of such payments were not good against the creditors of W.: Held, also, there being certain arrears of the annuity of 2,000L, and a fund in Court arising from the produce of the R. estate, that, as to that part of the fund which was not applicable to the portion of the annuity representing the annuity of 800l. currency, the creditors of W. had priority over the mortgagee, as well as over the executors of the widow.

The owner in fee of two freehold estates largely indebted by specialty and simple contract devises one to A. B., in fee, charged with the payment of one-fifth, but only one-fifth, of all his debts, and devises the other to C. D. in fee, charged with the payment of the other four-fifths, but no further

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Lyon c. Colville. part of those debts. These devises are not within the proviso of the Statute of Fraudulent Devises.

The compensation fund for slaves in Jamaica is legal assets for the payment of creditors.

Legacies given by different instruments, held, under the circumstances of the case, to be cumulative.

John Wedderburn the elder, being seised in fee of various large estates and plantations in Jamaica hereafter referred to, and being a partner in the house of Wedderburn, Webster, & Co., West India merchants, by his will, dated 6th August, 1819, directed, that all his just debts and funeral and testamentary expenses should be paid and discharged, in such manner as thereinafter mentioned and directed, by his trustees and executors thereinafter named, and after giving to his sister Katherine Wedderburn during her life an annuity of 250l., to be in satisfaction of any annuity to which she might be entitled under the will of his late brother James Wedderburn (1), gave and devised \*all his plantation and estate called the Prospect, in the parish of Hanover, in the island of Jamaica, with the lands, grounds, buildings, and other hereditaments thereto belonging, including therein all lands whatsoever belonging to him and then used, with all and every the appurtenances belonging thereto, and all and every the negro and other slaves whatsoever, and which should be in anywise belonging to said plantation estate and lands at the time of his death, unto and to the use of his eldest son James Wedderburn, his partner Andrew Colville, of Leadenhall

(1) James Wedderburn the elder, by his will, dated the 6th October, 1790, after giving an annuity of 2501. to his mother, bequeathed as follows: "Item, I give and bequeath unto each of my dear sisters Katherine Wedderburn, Thomasina Wedderburn, and Robina Wedderburn, the sum of 2001. sterling money of Great Britain, to be paid within one year after my decease, and also to each of them during their natural lives respectively, an annuity of 55l. sterling of Great Britain, to commence in one year after my decease." By a codicil, dated the 1st April, 1791, the testator, after willing that 100l. should be added to his mother's annuity, bequeathed as follows: "Item, My will is that 451. sterling be added to each of my three sisters, Katherine, Thomasina, and Robins, making to each of them an

annuity of 100l. sterling per annum. instead of 55l. as mentioned in my said will; the same to be and continue during the natural life of each of my said sisters." By an instrument, intitled "Heads of a Will," which was not signed by the testator, but which was admitted to probate in Jamaica, as a subsequent codicil, the testator after giving an annuity of 1,000l. per annum to his mother, for her life, to commence upon his death, bequeathed as follows: "To my sisters Katherine, Thomasina, and Robins, I bequeath one hundred guineas each for mourning, and to each of them during their natural lives 120%. sterling, to commence at same period. and for payment of said annuities subject all my estate real and personal."

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Street, merchant; James Wedderburn, his Majesty's Solicitor-General for Scotland; and his partner Alexander Seton, of Leadenhall Street aforesaid, merchant, their heirs and assigns, upon trust that they his said trustees and the survivors and survivor of them, and the heirs and assigns of such survivor, should, in the first place, out of the rents and produce of the said plantation, estate, slaves, and hereditaments and premises, after paying and discharging all contingent charges and expenses whatsoever, (some of which were mentioned), pay to his second son John Wedderburn, until he should have attained the age of twenty-five years, the yearly sum of \*1,000l., by equal quarterly payments; and in the next place should, out of the rents, issues, and profits, and produce of the said plantation, hereditaments, estates, slaves, and premises, from time to time purchase such number of negroes or other slaves, for the use of the same plantation, as should be sufficient to keep up the strength of slaves on the said plantation and the lands thereof equal to what the same should be at his decease, whilst his said trustees or trustee for the time being should continue to be in the receipt of the rents, issues, and produce of the said plantation, estate, slaves, and premises under or by virtue or for the purposes of that his will; and after applying such sum and sums of money for the several purposes aforesaid, as the same might become necessary, should in the next place retain the residue of such rents and profits, and apply the same towards the discharge of his just debts, until one full and equal fifth part of the said debts should have been thereby paid and satisfied, which he charged on the premises in exoneration of his personal estate; and when the trusts aforesaid should have been performed and satisfied, then should accumulate the residue and surplus of the said rents, issues, profits, and produce of the said plantation, hereditaments, estate, slaves. and premises during the time his said son John Wedderburn should be living, and under the age of twenty-five years; and subject as aforesaid, it was his will that they his said trustees, their heirs and assigns, should stand and be seized and possessed of, and interested in his said plantation or sugar-work called Prospect, with the land. grounds, buildings, and other hereditaments thereto belonging, and also all the negro and other slaves thereupon or thereto belonging as aforesaid, with their and every of their rights, members, and appurtenances, upon trust, by and out of the rents and profits thereof, or by any other lawful ways and means whatsoever, to raise and levy so much money as should be necessary for payment of one

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full fifth part of his debts, which \*he charged on the said premises in exoneration of his personal estate, or so much thereof as should not be raised under the trusts in that behalf thereinbefore declared, and for which monies the receipt of the trustees were to be sufficient discharges; and subject to, and charged and chargeable with such one-fifth part of his said debts, in trust for his said son John Wedderburn the younger, and the heirs of his body lawfully issuing, with remainders over.

. The testator then gave certain directions concerning the accumulations of rent before mentioned. He then gave to his wife Mary Wisdom Wedderburn certain specific chattels and the sum of 500 guineas, to be paid to her immediately after his decease; and after reciting an indenture of settlement, bearing date 2nd July, 1788, and made between himself and his wife of the first part, his said late brother James Wedderburn the elder of the second part, and John Grayson. Esq., of the third part, he the testator had secured to his said wife during her life, if she should happen to survive him, a jointure annuity, or clear yearly rent-charge or sum of 800l., current money of Jamaica, charged upon his plantation or sugarwork called Spring Garden, with the slaves, stocks, and appurtenances thereunto belonging, in the parish of Westmoreland, in the county of Cornwall and island of Jamaica aforesaid, which annuity was in lieu of a like annuity secured to her by her marriage settlement, dated the 25th July, 1782, and also in bar of dower and thirds, and reciting, that he the testator was desirous of making a larger provision for her, he the testator gave, devised, and bequeathed unto his said wife and her assigns during her life, if she should happen to survive him, one annuity, yearly rent-charge, or sum of 2,000l. sterling, payable quarterly, and in lieu and satisfaction of all dower and thirds. And the testator declared, that, if his said wife should not, within eight calendar months after his decease, release to his trustees all the dower and thirds, and elect to accept the said annuity of \*2,000l., together with the other legacies given to her, as a full compensation for the annuity of 80%. currency, and all other claims by virtue of any settlement, and in satisfaction of dower, then the said annuity should cease and be absolutely void. And the testator charged the said annuity of 2,000l., and also an annuity of 50l. to Miss Drummond, upon his plantation called the Retreat, in the parish of Westmoreland, in Jamaica, and his penn called Paradise, in the same parish, together with all the lands, buildings, works, slaves, stock, utensils, and

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effects thereto respectively belonging or appertaining, thereinafter given and devised upon the trusts thereinafter declared, and with powers of distress and entry for better securing such annuities.

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The testator then, after giving certain annuities, gave unto his wife all his stock of wine and other liquors which should be in his dwelling-house in Devonshire Street, and in his dwelling-house at Chigwell Row, in the county of Essex, at the time of his decease. And he also gave to her his house in Chigwell Row, with the appurtenances, for her life. And he gave to her, during her life, the use and enjoyment of his plate and other specific chattels in and about his dwelling-houses; and after her decease, he gave her estate and interest in the said messuage or dwelling-house in Chigwell Row, and the grounds and premises thereto belonging, and also all chattels and effects the use and enjoyment of which he had thereinbefore given to his said wife during her life, unto his said son James Wedderburn the younger, his heirs, executors, administrators, and assigns, for his and their own use.

The testator then gave and devised all that his plantation or sugar-work called Spring Garden Plantation, situate in the parish of Westmoreland, in the island of Jamaica, together with all those penns belonging to the same plantation, or held and occupied therewith, and respectively called Negrill Penn and Mount Edgecombe Penn, and the lands \*thereof, together with all the outbuildings and appurtenances thereto respectively belonging, and also all and singular the negro and other slaves which should be upon or belonging to the same respectively, with their and every of their rights, members, and appurtenances, unto and to the use of the said Andrew Colvile (1), James Wedderburn, Solicitor-General, and Alexander Seton, their heirs and assigns for ever, upon trust, in the first place, out of the rents and profits of the same premises, to raise so much money as might be requisite to make up the deficiency of his residuary real and personal estate for payment of the four fifth parts of his just debts, and the whole of his funeral and testamentary expenses and legacies, and of the annuities which were respectively thereinafter charged upon, and made payable out of the same, (for which monies so to be levied and raised the receipt or receipts of his said trustees or trustee were to be sufficient discharges); and subject thereto, in trust for his eldest son James Wedderburn, for his life, and after his decease, in trust for John Kellerman Wedderburn, son of the said James Wedderburn, and

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<sup>(1)</sup> The spelling of this name varies in the report.

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his assigns, for life, and after his decease, then in trust for his first and other sons, &c., in tail, with remainders over. And as to all and singular his plantations or sugar-works, penns, lands, tenements, slaves, and hereditaments in the island of Jamaica, not thereinbefore devised or disposed of, and all the live and dead stock. utensils, implements, and chattels, which at the time of his decease should be upon or belonging to, or used with said plantations. penns, lands, and estates respectively, and all the residue of his real and personal estate whatsoever and wheresoever, he gave, devised, and bequeathed the same respectively to his said son James Wedderburn the younger, if he should survive him, his heirs. executors, administrators, and assigns, subject to the annuities and other charges to which the same estates, or some parts thereof. were liable; and also subject to, and charged and chargeable with the payment of \*four full and equal fifth parts of all and every the debts, of what nature or kind soever, which should or might be due and owing from him at the time of his decease, and the remaining fifth part of which were to be paid out of his aforesaid estate called Prospect, and the hereditaments and premises settled therewith, as thereinbefore was provided, and also the whole of his funeral and testamentary expenses, and of the legacies given by that his will, or by any codicil thereto. And the testator appointed his wife, Mary Wisdom Wedderburn, during her widowhood, and also his said eldest son James Wedderburn, and the said Andrew Colvile, James Wedderburn, Solicitor-General of Scotland, and Alexander Seton, executors of his said will.

The testator made two codicils to his will, by one of which he revoked the devise of his house at Chigwell Row, and directed the trustees to sell it, and invest the proceeds in the purchase of another residence for the use of his wife for her life; and he directed, that the house so to be purchased should, after her decease, belong to his eldest son absolutely.

The testator died in December, 1820, and his will was proved by his son James Wedderburn the younger, Andrew Colvile, and Alexander Seton. The widow, some time afterwards, executed a release of her claim of dower, and elected to take the annuity of 2,000. given to her by the will.

At the time of the testator's death he was indebted to the copartnership firm of Wedderburn, Colvile & Co. in the sum of 42,650l., that being the reduced amount of a much larger debt which had been due from his brother James Wedderburn the elder to the same house, in which he also had been a partner, and which debt was adopted by the testator.

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Application having been made some time in 1830, by James Wedderburn the younger, to the plaintiff David \*Lyon, for the loan of a sum of 42,650l., for the purpose of paying off the above-mentioned debt, and that application having been consented to, it was agreed between these parties, that repayment of the whole of the money advanced should be secured by the bond and warrant of attorney of James Wedderburn the younger, and also a mortgage of the Retreat and Paradise Penn estates, and an estate called Moreland; and it was further agreed between James Wedderburn the younger and his brother John, that, upon James's discharging the whole debt by means of such mortgage, John should give his brother a mortgage for one-fifth of the amount on the Prospect estate, pursuant to the direction in the testator's will, by which one-fifth of that debt was charged on that estate.

These arrangements were accordingly carried into effect by means of the bond and warrant of attorney of James, as before mentioned, disentailing deeds executed by John, of the Prospect estate, and by two sets of deeds of lease and release, which were to this effect:

By indentures of lease and release, dated the 22nd and 23rd December, 1830, and made between James Wedderburn the younger of the first part, the plaintiff of the second part, and certain persons therein named of the third part, reciting the agreement between James Wedderburn the younger and the plaintiff; It was witnessed, that, in pursuance of such agreement, and for better securing the said sum of 42,650l., &c., the said James Wedderburn the younger granted, released, and assigned to the plaintiff all those three several plantations or sugar-works called the Retreat, Moreland, and Paradise Penn, with the appurtenances, and all slaves, &c., and all coppers, stills, &c., to hold all such parts of said premises as were of the nature of freehold or real estates unto and to the use of the plaintiff, his heirs and assigns, and all such parts as were chattel or personal estate unto the plaintiff, his executors, administrators, and assigns; but subject, nevertheless, \*as to the lands of the said penn called Paradise, to a right or privilege of pasturage thereon given by the will of John Wedderburn the elder in respect of the plantation or estate called the Prospect, and subject also, as to such of the said premises as were charged therewith, to the several annuities in and by the same will given or bequeathed, or such of them as then continued payable, and to the powers and

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remedies for recovering the same respectively when in arrear, but freed and discharged of and from the debts and legacies by the same will charged and made chargeable upon the same premises, and of and from all other charges and incumbrances whatsoever, and subject also, as to all the said hereditaments and premises, to a proviso or condition for redemption thereof on payment by the said James Wedderburn the younger, his heirs, executors, or administrators, to the plaintiff, his executors, administrators, or assigns, of the sum of 42,650l., with interest for the same as therein mentioned.

By indentures of lease and release, bearing even date with the former, and made between John Wedderburn the younger of the first part, James Wedderburn the younger, Colvile, and Seton, of the second part, James Wedderburn the younger of the third part, John Watson of the fourth part, and other persons of the fifth part, reciting the agreement between John and James as before stated: It was witnessed, that, in consideration of 8,530l., being the amount of one-fifth of the debt due to Wedderburn & Co., having been paid off by James Wedderburn the younger, and for the other considerations therein mentioned, the said several persons parties thereto of the second part, acting at the request and by the direction of the said John Wedderburn the younger, and on the nomination of the said James Wedderburn the younger, did release and assign, and the said John Wedderburn the younger did release, assign, ratify, and confirm, unto the said John Watson, his heirs, executors, administrators, \*and assigns, all that plantation, sugarwork, or estate called the Prospect estate, to hold to the said John Watson, his heirs, executors, administrators, and assigns; subject nevertheless to a proviso for redemption upon payment by the said John Wedderburn the younger, his heirs, executors, or administrators, or the persons parties thereto of the second part, their heirs, executors, or administrators, or any of them, unto the said John Watson, his executors, administrators, or assigns, of the sum of 8,580l., with interest as therein mentioned.

By a deed of trust, bearing even date with the indentures of release, it was declared that Watson should stand seised of the Prospect estate, upon trust for the plaintiff, his executors, administrators, and assigns, for better securing to him and them the payment of the said sum of 42,650l., and interest secured by the bond of James Wedderburn the younger, and subject thereto, in trust for the said James Wedderburn the younger, his heirs, executors, administrators, and assigns.

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By an indenture of assignment, dated the 16th March, 1831, to vhich the partners in Wedderburn's house were parties of the first part, reciting the payment by James Wedderburn the younger to that house of 42,650l., in discharge of the debt due to them from the testator's estate, the parties of the first part, at the request of James and John Wedderburn the younger and the plaintiff, assigned the said debt to William Lyon, his executors, &c., in trust to secure the sum of 42,650l., due to the plaintiff, and then in trust for James and John Wedderburn the younger in proportion to their respective shares.

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In April, 1831, James Wedderburn the younger died, having by his will charged all his real and personal estate with the payment of his debts and legacies, and having given powers of sale to his trustees over all his real estates, with a direction, subject to these provisions, to settle the real estates upon his son J. K. Wedderburn, at the age of \*twenty-five, for life, with remainder to his issue in strict settlement.

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The bill was filed against the executors of John Wedderburn the elder, and the same persons as administrators with the will annexed of James Wedderburn the younger, John Kellerman Wedderburn, John Wedderburn the younger, J. W. Wedderburn the eldest son and first tenant in tail in esse of the estates devised in strict settlement under the will of John Wedderburn the elder, Mary Wisdom Wedderburn, John Watson, and William Lyon. After stating the foregoing facts, together with other matters not material to the present report, the bill prayed an account and payment of the plaintiff's debt, and, if necessary, an inquiry as to prior incumbrances, and for a sale of the mortgaged premises, subject to such incumbrances, (if any), and for payment of the plaintiff's debt out of the proceeds, if sufficient, and, if insufficient, out of the other securities of the plaintiff in the bill mentioned, including the said debt of 42,650l. and mortgage for 8,580l., as held by the defendants Lyon and Watson in trust for the plaintiff; and for that purpose. that the usual accounts might be taken of the real and personal estates of the several testators in the bill named and of their debts, and that the rents and proceeds of such estates might be followed in the hands of the executors and devisees of the testator, &c., and for a foreclosure of the mortgage for 8,580l., and for receivers of the personalty, and consignees of the realty, &c.

The cause came on for hearing in August, 1899, when a decree was made directing the usual accounts to be taken of the real and

Lyon c. Colville. personal estates of the several testators and of their debts and legacies, and for the application of the personalty in a due course of administration; with directions to the Master to ascertain the priority of incumbrances (if any) affecting the real estates; with liberty to state any circumstances specially.

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In March, 1835, Mrs. Wedderburn, the widow of the testator John Wedderburn the elder, died, and some years \*afterwards John Wedderburn the younger died; whereupon a bill of revivor and supplement was filed against the respective executors and devisees of those parties; and in that suit a decree was made whereby the inquiries and accounts directed by the original decree were ordered to be continued.

In February, 1844, the Master made his report, whereby he found that the plaintiff's debt had, on the 30th April, 1843, been reduced by various payments to the sum of 85,894l. 3s. 6d., and that that proportion of it which was charged on the Prospect estate had been reduced at that time to 3.767l. 3s. 1d. And he found the total amount of debts proved against the estate of John Wedderburn the elder to be 209,927l. 2s. 8d., of which the amount of specialty debts was 86,242l. 19s. 6d.; and that of these specialty debts, one, amounting to 28,548l., was due to the trustees of the settlement made upon the marriage of James Wedderburn the younger with Isabella Lyon, under which settlement John K. Wedderburn, as a child of that marriage, was interested. The Master further stated that a claim had been made against the estate of John Wedderburn the elder, which he the Master had not yet allowed, but by reason of which he had disallowed various payments made by the executors; it appearing to him to be at present doubtful, in consequence of the before-mentioned claim, whether the assets of the testator John Wedderburn the elder would be sufficient to pay his debts. payments so disallowed by the Master were included payments made by the executors on account of legacies and annuities given by the testator's will, the whole of which (except some portion of the annuity of 2,000l. given to Mrs. Wedderburn) had been paid by the executors.

With respect to the devise and bequests made to Mrs. Wedderburn, the Master reported, that, after the death of the testator John Wedderburn the elder, the house and furniture at Chigwell had been sold, with Mrs. Wedderburn's consent, and that in lieu thereof James Wedderburn \*the younger, as one of the executors and residuary legatees of John Wedderburn the elder, agreed to pay her

nt of the testator's estate, and did pay her, so long as he lived, an nnual sum of 400l. The Master further found that the annuity 2,000l. given by the will of John Wedderburn the elder to Mrs. Vedderburn had been paid to her to the 1st April, 1831, and that ne annuity of 400l. had been paid to her to the 1st May, 1831, and hat there was due, at the date of the report, to the executors of Irs. Wedderburn, on account of the arrears of those annuities, the um of 9,000l. He also found that there were funds in Court rising from the produce of the several estates of the testator.

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The cause now came on for hearing for further directions.

The principal questions were-

1st. Whether, as between the executors and creditors of John Wedderburn the elder, the executors were entitled, notwithstanding Mrs. Wedderburn's election to receive the 2,000*l*. annuity, to ascribe a part of the payments made by them in respect of that annuity to the prior annuity of 800*l*. currency, and to that extent to take precedence of the creditors.

2ndly. Whether, assuming that Mrs. Wedderburn was not entitled as against the creditors to receive the remaining part of the annuity of 2,000*l*., that is to say, that part which was not referable to the 800*l*. per annum currency, or supposing her representatives to disclaim all interest in that part, the plaintiff, as mortgagee of the Retreat estate, upon which the annuity of 2,000*l*. was charged, was entitled as against the creditors to the arrears of that part.

Srdly. Whether the assets of John Wedderburn the elder, consisting of a share of compensation money for slaves and of lands in Jamaica, were, independently of his will, legal or equitable assets for the payment of creditors; and if independently of his will they were legal assets, whether by his will he had made them equitable.

The following statutes have reference to this last point:

The Jamaica Act, of 1 Geo. II. c. 1, by which it is enacted, that all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted, or received as laws in this island, shall and are hereby declared to be and continue laws of his Majesty's island of Jamaica for ever (1).

The English statute, 5 Geo. II. c. 7, s. 4(2), which enacts, that the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations, (viz. British plantations in America), belonging to any person indebted, shall be liable to, and chargeable with all just debts, duties, and demands, of

(1) 1 Howard, 46.

(2) Rep. S. L. R. Act, 1887.

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what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantstions respectively are seized, extended, sold, or disposed of for the satisfaction of debts.

The Jamaica Act, 24 Geo. II. c. 19, regulating executions against lands (1).

The English statute, 87 Geo. III. c. 119 (2), which repeals the 4th section of the 5 Geo. II. c. 7, so far as relates to negroes.

The Jamaica Act, 50 Geo. III. c. 21, s. 2 (3), which is as follows: "And whereas, in and by certain of the Acts and clauses of Acts herein and hereby repealed, provision was \*made for making slaves assets for payment of debts and legacies, and in what manner they should descend and be held as property, and be conveyed in certain cases, and it is expedient to continue and amend such wholesome regulations; be it further enacted, that no slave shall be free by becoming a Christian; and for payment of debts and legacies all slaves shall be deemed and taken as all other goods and chattels are in the hands of executors or administrators, and where other goods and chattels are not sufficient to satisfy the said debts and legacies, then so many slaves as are necessary for the payment of debts and legacies shall be sold, and the remaining slaves, after payment of said debts and legacies, shall be judged, deemed, and taken as inheritance, and shall accordingly descend."

Mr. Russell, having opened the case for the plaintiff, was proceeding to contend upon the first and second points, that this case differed from Eland v. Eland (4), when the VICE-CHANCELLOB observed, that, if the representatives of the widow were disposed to give up their claim under the plaintiff's mortgage-deed, some distinction might possibly be drawn between the two cases; but otherwise they seemed not distinguishable.

<sup>(1) 1</sup> Howard's Laws of the Colonies, 54; Burge Comm., vol. 2, p. 647.

<sup>(2)</sup> Rep. S. L. R. Act, 1871.

<sup>(3) 1</sup> Howard, 79.

<sup>(4) 48</sup> R. R. 134 (1 Beav. 235; 4 My. & Cr. 420).

Mr. Roundell Palmer, for the representatives of the widow, then disclaimed all interest under the mortgage-deed.

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### Mr. Russell and Mr. James Parker, for the plaintiff:

The widow's representatives having disclaimed, this case differs from Eland v. Eland. There the parties contesting were those for whose benefit the reservation was made, and those against whom it was made. No reservation was here made, or ever was intended to be made, for the creditors, although the widow's right was reserved. The plaintiff's security was made valid against all creditors. \*was to be subject to the widow's annuity, but "freed and discharged of and from the debts and legacies by the same will charged" upon the premises, "and of and from all other charges and incumbrances whatsoever." In Eland v. Eland there was a mere covenant against incumbrances, save and except the legacies, In the present case, if the widow had released the annuity, could the creditors have come here to set it up? If she or her representatives think fit not to insist on the deed, can the creditors compel them to do so, in order that they may have the benefit of The creditors were not parties to the deed, and cannot, under the circumstances, insist upon it.

Mr. Burge, Mr. Wigram, and Mr. Rennalls, for the defendant John K. Wedderburn:

This defendant, being a specialty creditor to the amount of 28,000*l*., is interested in obtaining a declaration that the assets are legal.

First, the lands in Jamaica are legal assets. When the stat. 5 Geo. II. was enacted, there were no colonial lands which were not treated as chattels (1). \* \* \*

2ndly, the slaves were personalty and legal assets. There was no heritable quality in the slave till the debts were paid. The executor had the first right to him. \* \* Being personalty, the exception in the Statute of Fraudulent Devises could not apply to a devise of them; and they were, therefore, legal assets, and the compensation fund is therefore legal assets.

Srdly, supposing that these assets (in themselves legal) were capable of being rendered equitable by devise, the will of the testator John Wedderburn the elder has not that effect. He has not provided for the payment of all his \*debts, but has charged

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(1) See 2 Vent, 358.

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Mr. Swanston and Mr. Colvile, for the defendants the executors of John Wedderburn the elder, contended, that their clients were justified in making the payments which they had made to the widow, and that they were entitled, as against the creditors, to ascribe a portion of those payments to the annuity of 800l. per annum currency.

[467] Mr. Geldart, Mr. Wood, and Mr. Calvert appeared for other parties.

Mr. Russell, in reply. \* \* \*

## Nov. 25. THE VICE-CHANCELLOR:

I have considered this case, and formed an opinion upon those points in it that are apparently the most important.

It seems convenient to dispose, in the first instance, of the claim made by the testator's executors and trustees to be allowed for the payments made by them to his widow, in respect of the annuity of 2,000l. per annum bequeathed to her, so far as they ought to be ascribed (and certainly a due proportion of them ought to be ascribed) to the annuity of 800l. per annum currency, to which she is agreed on all hands to have been entitled, independently of the will and codicils. If the report, as it stands, ought to be considered as precluding this claim, I should give leave to except, but I do not understand that objection to be taken.

[\*468] The contention against the executors and trustees has \*been, that the widow having, as it is said, conclusively elected to take under her husband's will and codicils, those instruments disclose an intention that the 800l. per annum currency should, as to its

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priority, and for every purpose, be extinguished, but without reviving or giving any title to dower. I think, however, that the will and codicils ought not to be so interpreted, ought not to be considered as directing or requiring that the testator's general creditors should have precedence and priority over those rights which his wife had acquired by settlement after the marriage. has not been contended, that the deed by which she released her title, if any, to dower, or any act done by her, except her mere election to take under the will and codicils, affected those rights. If, however, my view of the construction of the will in this respect is incorrect, (and I am not perfectly confident of its correctness), the same result may possibly be obtained in another way. The accounts were not fully taken nor the state of the assets ascertained, as I understand, in her lifetime. It may be, therefore, that her election to take under the will and codicils ought not to be treated as finally or conclusively made; and it may possibly be, that, as matters are now shown to stand and to have stood, it was for her advantage not to elect to take under the will and codicils. Electing to claim against them, she would be, of course, entitled to the 800l. per annum currency in preference to the testator's creditors. This priority, indeed, on one ground or the other, may be thought to be admitted by the language of the decree. It appears to me, on the whole, that the testator's executors and trustees are entitled to ascribe to the 800l. per annum currency a due proportion of the payments which they made to the widow in respect of the 2.000l. per annum, and to stand so far above the creditors in her place, and that a declaration should be made accordingly.

Then comes the question as to the 9,000l., reported as \*due to her executor Mr. Freshfield. I am not sure whether I mistook the argument; I may have done so, but I understood it to describe the whole of this sum as referable to the 2,000l. per annum, and to describe the real estate at Chigwell as freehold. I collect, however, from reading the report, that this amount of 9,000l. is in part composed of arrears of the annuity of 400l. per annum, agreed, after the testator's death, to be paid to his widow in lieu of certain claims under his will and codicils, including her interest in the real estate at Chigwell, and that this estate was copyhold. Not recollecting to have heard any argument as to the course, under these circumstances, to be taken with respect to that property or its produce, or with respect to so much of the 9,000l. as is referable to the 400l. per annum currency, I had rather reserve, and I do reserve, these

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Lyon e. Colville. two matters altogether, giving leave, of course, (indeed wishing), that counsel should speak to them on the present occasion, or a future day. The nature of the Chigwell property may possibly have a bearing on the point of election if made.

The residue of the 9,000*l*. must be treated as apportioned between the 800*l*. per annum currency and the remainder of the 2,000*l*. per annum, and, so far as it is referable to the 800*l*. per annum currency, must, I suppose, be taken from the produce of the property specifically burthened with that charge, in preference to the claims of the plaintiff and of the testator's creditors, and be paid either to Mr. Freshfield, notwithstanding the disclaimer at the Bar, or to the testator's executors and trustees, by reason of the payments made by them to the widow, in respect of the merely bequeathed portion of the 2,000*l*. per annum. To this, also, the counsel can speak, if they wish it.

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With regard, however, to the remaining portion of the 9,000l., that I mean which represents arrears of the merely bequeathed portion of the 2,000l. per annum, the contest \*is merely between the plaintiff and the testator's general creditors; it being asserted for them, and he denying, that this part of the 9,000l. ought to be withdrawn, for their benefit, from the produce of the estate mortgaged to the plaintiff. Upon this question was cited Eland v. Eland (1), decided by Lord Langdale and Lord Cottenham, a case as to which I have been unable to free my mind wholly from doubt. Whether I should have considered it as absolutely binding on me, if I had formed and retained a strong or clear opinion against it, I need not say; for I have not a strong or clear opinion against it, and I think that I ought to follow it. The plaintiff's counsel have, however, argued reasonably and fairly, that, assuming Eland v. Eland to be a binding authority, the present case is distinguishable from it in a manner favourable to the plaintiff. have considered the grounds of distinction suggested, and do not think them substantial, at least in his favour. I am not sure that the present case is not more favourable to the creditors here, than was Eland v. Eland to the creditors there. I doubted for some time whether the disclaimer of Mr. Freshfield, the widow's personal representative, might not be considered to vary the case in the plaintiff's favour, but I have come to the conclusion that it ought Following Eland v. Eland, I ought, I think, to treat the widow's annuity as expressly exempted from the operation of the

<sup>(1) 48</sup> R. R. 134 (1 Beav. 235; 4 My. & Cr. 420),

plaintiff's security, as by agreement not touched by it, as being, therefore, left in her, notwithstanding that security; and, consequently, as so left, subject to the creditors' claims to the extent to which their claims were paramount. Upon that footing, they, therefore, continued to have an interest, which, as she could not displace by assigning, so neither could she, nor can her personal representatives, displace by disclaiming, as I conceive; although it is probably true, the qualification of the security as to the annuitants was not intended for the creditors' benefit, and \*although the plaintiff might possibly, though I do not say whether he could, have taken his security free from the merely bequeathed portion of the annuities, and did take it free in express terms from the claims of the creditors, who, to a certain extent, are thus admitted upon him through the widow's reserved title. It seems to me rather a hard case, but I think, that, if Eland v. Eland was rightly decided, it would be unsound to give the plaintiff what he asks in this respect, The creditors, therefore, or the specialty creditors, must take from him a portion of the produce of the estate mortgaged to him, equal to so much of the 9,000l. reported due as represents arrears of that part of the annuity of 2,000l. per annum to which the widow was

not entitled by a right above the testator's will.

With regard to the question whether the compensation fund, representing the testator's slaves in Jamaica, is to be distributed as legal or as equitable assets, it appears to me, considering the Acts of the colonial Legislature of the reigns of Will. III. and Geo. III., and the British statute of 37 Geo. III., mentioned in the argument, that this fund must be treated, so far as the creditors are concerned, as personal estate, and, therefore, as legal assets. Upon principle, this point appears to me clear of doubt. I had some apprehension whether to decide so might not be in opposition to general opinion, or to settled habits or practice. I do not, however, think that there was sufficient ground for that apprehension.

As to the real estate, so far as consisting of lands in Jamaica, though I thought, and still consider, it doubtful whether property of this description was not made in effect equitable assets by the British statute 5 Geo. II. c. 7; yet, as I only doubt, and as I am told that there is not any trace of such an interpretation having been put on the statute, and it is, I think, to be collected, that Sir Thomas Plumer and the present Vice-Chancellor of England have both viewed it as not admitting that construction, I conceive \*that I ought to treat the statute as not having intended to place

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simple contract creditors on an equal footing with specialty creditors as to real estates in Jamaica.

It must next, however, be considered, whether it was competent to the testator to make this property by his will equitable assets; and, if he could do so, whether he has done so. The doctrine of equitable assets is based on the power which testators in England had before the reign of Will. III., to disappoint their specialty creditors of all resort to their freehold estate by devising it. they not had such a power, or had the English Legislature provided simply that freehold estates in England devised should be liable to specialty creditors in the same manner as freehold estates descending, or that all freehold estates in England, whether devised or descending, should be assets for the payment of all debts in the same manner as personal estate, there would have been no place for the doctrine of equitable assets. There is, as to real estates in Jamaica, the British statute of 5 Geo. II., already mentioned. If that makes all real estates there devised or descending applicable for the payment of debts, in the same manner as personal estate. it would seem difficult to say, how real property in Jamaica could be equitable assets. The statute, however, has the expression "in like manner as real estates are by the law of England liable;" a phrase, Mr. Rennalls's observation on which deserves attention. Nor must the authority of Sir Lancelot Shadwell's decision, in Charlton v. Wright, be forgotten. Mr. Burge has stated, and probably with his usual accuracy, that the Statute of Fraudulent Devises is generally understood and considered to have become incorporated into the laws of Jamaica, independently of the statute But, however this may be, I conceive it to be impossible to hold, consistently with the statute 5 Geo. II., that after it had passed it could be competent to a landowner in Jamaica so to devise his real estate there as wholly to disappoint his creditors; and \*if he could not, he must, I think, in order to make it equitable assets, (supposing the law not to have made it absolutely, and of necessity, equitable assets), conform to the Statute of Fraudulent Devises, as part of the law of England mentioned in the statute 5 Geo. II.

Assuming, then, that it was competent to the testator to make his plantations in Jamaica equitable assets in this way, and only so, has he done it? My impression is, that he has not; thinking, that, as the direction to pay the debts at the commencement of the will is expressed, it must be considered to be qualified and restrained

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by the subsequent provisions. This case, putting it in a manner as favourable to the simple contract creditors as its actual condition can be considered to warrant, may, I conceive, be stated thus: The owner in fee of two freehold estates, largely indebted by specialty and simple contract, devises one to A. B. in fee charged with the payment of one-fifth, but only one-fifth, of all the testator's debts, and devises the other to C. D. in fee charged with the payment of the other four-fifths, but no further part, of those debts; that is to say, four undivided fifths of the general mass of debt. upon principle nor upon authority am I satisfied that these devises are within the proviso of the Statute of Fraudulent Devises, that is, that they are such a provision for the payment of debts as to make the devised estates wholly or partially equitable assets. But if the Prospect estate had been subjected by the testator to the payment of the whole, and not merely one-fifth of his debts, in the same form and mode, however, in which he has provided for the fifth, I am not satisfied, considering the manner in which he regulates and directs the management of the property, (not forgetting especially his direction respecting the acquisition of slaves), that the Prospect estate would have been well devised against the statute, that is, would have been wholly or partially equitable assets; particularly as John Wedderburn, the devisee \*of it, survived, and was but in the twenty-third year of his age at the death of the testator, for so I understand the fact to have been: nor, as to the Paradise and Retreat estates, if they had been charged with the whole, as, that is, exactly as, they are charged with fourfifths, of the debts, is it clear to me that they would have escaped the statute.

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On the whole, my impression is, that, according to the proper construction of the Statute of Fraudulent Devises, there was not in this will a "devise or disposition of any real estate for the raising or payment of any real and just debt or debts."

But, though I have upon reflection come to this conclusion, I cannot say that I have done so without hesitation, or that my mind is altogether free from doubt upon the point, which I think one of some difficulty, especially considering the case in Sir George Cooper's Reports (1), (with which I understand the Register's book to agree), and considering the possibility of applying one portion of the produce of a real estate devised—in the manner, for instance, in which the Prospect and Paradise property was by this testator—as equitable assets, and the remaining portion of it as legal assets.

Lyon c. Colville With my view, however, of the law, and the not improbable consequences of the precedent, if any part of the real estate or its produce were held to be equitable assets in the case before the Court, I prefer, that, if it is to be so held, it should be by other authority than mine.

I have not yet mentioned the allowances claimed by the executors in respect of their payments of Miss Katherine Wedderburn's annuities. They are entitled to these allowances, at least against that part of the testator's real estate which was made liable to her by the will and codicils of his brother James Wedderburn for the annuities that he gave her, to the extent of that liability. It seems to me clear, that of the three annuities given to her by James \*Wedderburn, amounting together to 220l. per annum, he meant neither by way of substitution or satisfaction for both or either of the others.

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1844. Dec. 6. 1845. March 13.

KNIGHT BRUCE, V.-C.

## SUTHERLAND v. COOKE.

(1 Coll. C. C. 498-505; S. C. 14 L. J. Ch. 71; 8 Jur. 1088.)

A testator, after bequeathing certain leaseholds for years to A., who died in the testator's lifetime, and after bequeathing several legacies, gave and bequeathed to trustees all his money in the Long Annuities, and other of the public stocks or funds, ready money, and securities for money, outstanding debts, and all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, upon trust in the first place, by sale thereof, or of so much thereof as should be necessary for that purpose to pay thereout all his debts and funeral and testamentary expenses and the legacies by him thereinbefore given, and subject thereto to pay the dividends and interest thereof to B. for life, and after B.'s decease to permit C. to have the dividends and interest for life; and after the decease of the survivor of B. and C., he bequeathed the principal of the said trust fund to the children of D.: Held, that the tenants for life were not entitled to the enjoyment in specie of the rents of the leaseholds and the dividends of the stock, but that the leaseholds and stock must be invested so as to be permanently productive for the persons entitled to it, according to the limitations of the will.

Where a will contains an implied, but no specific, direction for conversion of the property, and by an innocent mistake it has been left upon the original security and the income enjoyed by the tenant for life in specie, the Court, upon the mistake being rectified, will, at its discretion, allow the tenant for life interest at the rate of 4l. per cent. per annum upon the value of the property as taken at the expiration of one year from the testator's death-

WILLIAM COOKE, by his will dated the 9th July, 1892, gave to his brother Robert Cooke, and his friends Robert Sutherland and Samuel Argill, their executors, administrators, and assigns, certain copyhold messuages, situate near the Commercial Road and Berner Street, in the parish of St. George in the East, to hold the same for all the residue and remainder of the several terms and

interest therein upon trust, to pay the rents and profits thereof to SUTHERLAND his niece Mary Jones, for the term of her natural life, for her own sole and separate use and benefit; and after her decease the testator gave and bequeathed the same several leasehold messuages and premises to such person and persons, &c., as the said Mary Jones, notwithstanding her coverture by any deed or deeds to be by her legally executed, or by her last will, &c. should direct or appoint; and in default of such appointment the testator did thereby direct that the said leasehold messuages or premises should sink into and form a part of the residue of his estate and effects thereinafter bequeathed, and to and for no other trust, intent, or purpose whatsoever. The testator then, after bequeathing various legacies, bequeathed as follows: "Also I give and bequeath unto the said Robert Cooke, Robert Sutherland, and Samuel Argill, all my money in the Long Annuities, and in all or any other of the public stocks or funds, ready money, and securities for money, outstanding debts, and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature or kind soever the same \*shall or may consist at the time of my decease not hereinbefore specifically disposed of, to hold and take the same and every part thereof unto the said Robert Cooke, Robert Sutherland, and Samuel Argill, their executors, administrators, and assigns, upon trust, nevertheless, and to and for the several persons, intents, and purposes following: (that is to say), upon trust, that they my said trustees, or the survivors or survivor of them, his executors or administrators, do and shall, in the first place, by sale thereof, or of so much thereof as shall be necessary for that purpose, pay thereout all my debts and funeral and testamentary expenses, and the several legacies by me hereinbefore given and bequeathed; and, subject thereto, to pay to, or permit and suffer, and sufficiently authorize and empower my said brother Robert Cooke to have, receive, and take the dividends and interest thereof to and for his own use and benefit for and during the term of his natural life; and from and after his decease upon further trust, to pay to, or permit and suffer Hannah Cooke, the wife of the said Robert Cooke, in case she shall survive him and be then living, to have, receive, and take the dividends and interest thereof to and for her own use and benefit for and during the term of her natural life; and from and after the decease of the survivor of them the said Robert Cooke and Hannah Cooke, upon trust for, and I do hereby give and bequeath the

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COOKE. Principal of the said trust fund, and the stocks and securities wherein or whereon the same shall be invested, unto, all and every the children of my deceased brother George Cooke as shall be living at the time of my decease, equally to be divided between and amongst them, if more than one, share and share alike, and to their respective executors, administrators, and assigns, for ever, to take as tenants in common, and not as joint tenants; and if only one, then the whole to such only child, his or her executors, administrators, and assigns, for ever." And \*the testator appointed his said trustees to be executors of his will.

Mary Jones died in the lifetime of the testator.

The testator died in November, 1834, without having altered his will. Robert Cooke survived his co-executor Argill, and died in September, 1836.

The bill was filed by the surviving executor against Hannah Cooke and the children of George Cooke who were living at the testator's decease, praying that the rights and interests of all parties in the testator's residuary estate might be ascertained and declared, &c.

Hannah Cooke died after the institution of the suit.

The clear residue of the testator's property consisted of a sum of 55l. per annum, Government Terminable Annuities, a sum of 44l. per annum, Long Annuities, (both which sums were standing in the names of the executors), and the leasehold houses (held for years) mentioned in his will. The question was, whether, by the terms of the will, this property was to be enjoyed in specie by Hannah Cooke, the tenant for life, or to be converted for the benefit of the legatees in succession.

Mr. Craig, for the plaintiff, [distinguished Howe v. Lord Dartmouth (1) and Caldecott v. Caldecott (2)]. In Bethune v. Kennedy (3), a case similar to the present, the enumeration of different species of the testator's property in the residuary \*clause led the Court to the conclusion that the property was to be enjoyed in specie.

(The Vice-Chancellor: It may be an important consideration, tending to reconcile some of the cases, whether the gift of the residue precedes or follows the enumeration of particulars.)

<sup>(1) 6</sup> R. R. 96 (7 Ves. 137). 312)

<sup>(2) 57</sup> R. R. 544 (1 Y. & C. C. C. (3) 43 R. R. 153 (1 My. & Cr. 114).

Mr. Kenyon Parker and Mr. Giffard, for the representative of SUTHERLAND
Hannah Cooke:
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In Vaughan v. Buck (1), the enumeration of particulars was prior to the gift of the residue. Here, it is clear as to the Long Annuities, that the dividends, ultra what was required to be sold for payment of the legacies, were to be enjoyed by the tenant for life: Alcock v. Sloper (2), Collins v. Collins (3), Vincent v. Newcombe (4). And as to the leaseholds, there is an express direction that, upon the death of Mary Jones, they should go with the residue, that is, with the property which was not to be converted. That was thought of importance in Alcock v. Sloper.

Mr. Whitmarsh and Mr. F. Whitmarsh, for the parties interested in remainder, were stopped by the Court.

### THE VICE-CHANCELLOR:

I think that, if the cases of Vaughan v. Buck and Vincent v. Newcombe had come before me, I should have decided them as they were decided. Upon the cases of Alcock v. Sloper and Bethune v. Kennedy, it is not necessary for me (if it would be right) to offer any opinion: it is sufficient to say that the wills in those cases differed materially from the will in the present case.

The first question is, whether this is, prima facie, a residuary gift: it begins thus: (His Honour here read the residuary clause as far as the words "in the first place.") \*Now, I am of opinion, upon all principle, and upon the course of decision, that this is prima facie a mere gift of the residue. The mere fact that there is an enumeration or mention of some particulars does not prevent the bequest from being in effect residuary, and residuary merely. If it is a mere residuary gift as to the whole, it must be followed by all the consequences of a gift of the residue; it must be put in a state permanently productive for the persons entitled to it, according to the limitations of the testator's will. It is said, however, that there is an intention sufficiently expressed upon the will which corrects the prima facie meaning of the words of the residuary clause; an intention either that the gift was to be specific, or, if the gift was not to be specific, that the property was not to be converted. Now, it lies upon those who allege such an intention to show it; the question is, whether they have effectually done so.

(1) 65 R. R. 337 (Phill. 75).

[ \*502 ]

<sup>(3) 39</sup> R. R. 337 (2 My. & K. 703).

<sup>(2) 39</sup> R, R. 334 (2 My. & K. 699),

<sup>(4) 34</sup> R. R. 298 (Younge, 599).

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[ \*503 ]

Before we consider the words that are said to show such an intention, we must recollect—first, that this is a gift of personalty only, that there is no gift of realty mixed with personalty-and, in the next place, that the words "ready money" are found between the words "stocks or funds," and the words "and securities for money;" that the words "securities for money" are followed by the words "outstanding debts;" and that all these words are followed by the words "rest, residue, and remainder." There is no trust for investment of the property; and it is said that the testator has left nothing for the law of conversion to operate upon. But can the ready money and securities, and the outstanding debts, whether secured or not secured, remain in the same state as they were at the time of the decease of the testator? This appears to me impossible to hold. The testator goes on to direct his trustees. "by sale thereof"—not by receipt or conversion, but by sale; applying those words, according to the construction contended for, to ready money and outstanding \*debts-to "pay thereout all my debts and funeral and testamentary expenses, and the several legacies by me hereinbefore given and bequeathed "-words. exactly, which one would expect to find after a gift of residue— "and, subject thereto, to pay to, or permit and suffer, and sufficiently authorize and empower my said brother Robert Cooke to have, receive, and take the dividends and interest thereof to and for his own use and benefit," &c.

A fair observation has been made on the use of the word "dividends," as capable of being attributed only to the Long Annuities. I cannot, however, in this will so read that word. It is, I think, a mere general mention of dividends as equivalent to income. I apply this observation, however, only to the present will. There may be many wills in which the word may receive a different interpretation.

The testator then, after the death of the survivor of Robert Cooke and Hannah Cooke, gives and bequeaths the "principal of the said trust fund, and the stocks and securities wherein or whereon the same shall be invested," to the children of his brother George Cooke, &c. This is just the language which any testator would use in regard to any ordinary residue that he would expect to be invested in the general way. I am of opinion that I should be raising distinctions of a dangerous nature, if I were to hold that there was here anything of sufficient substance to justify a departure from the general rule.

By the decree, as drawn up by the Registrar, it was declared, that, SUTHERLAND according to the true construction of the will of the testator, William Cooke, the late defendant Hannah \*Cooke was not entitled to the actual dividends and rents which were produced by the Government Annuities for terms of years, and Long Annuities and leasehold messuages constituting the residue of the testator's personal estate, but was entitled, from the time of the death of her husband Robert Cooke, down to the time of her own death, to interest at the rate of 41. per cent. per annum, upon what was the value of the beforementioned property at the end of one year next after the testator's death.

COOK E. 1845. March 13. [ \*504 ]

A motion was now made that the minutes of the decree might be varied by inserting therein a declaration that the Government Annuities for terms of years, Long Annuities, and leasehold messuages, constituting the residue of the testator's personal estate, ought to have been sold at the end of one year after the testator's death, and a declaration, in lieu of the declaration as to the 4l. per cent, interest, that Hannah Cooke was, during the time before mentioned, entitled to such interest and dividends as would have been payable had the before-mentioned property been sold, and the produce of such sale invested in Bank 3l. per cent. Annuities.

Mr. Whitmarsh and Mr. F. Whitmarsh, in support of the motion, cited Howe v. Lord Dartmouth (1), Dimes v. Scott (2), Benn v. Dixon (3), contending, that, where the property was considered as converted and invested in the funds, the usual course was to allow the tenant for life interest at 3l. per cent. only.

Mr. Giffard, contrà, referred to Caldecott v. Caldecott (4).

### THE VICE-CHANCELLOR:

There is, I think, no positive rule on the subject. A will may be so framed as to make \*it the duty of the Court to consider the property as laid out in the 3l. per Cents. But where there is no specific direction for conversion, and by an innocent mistake the property has been left upon the original security, my opinion is, that it has always been considered competent to the Court to allow the tenant for life interest at 4l. per cent.; and I think that, consistently with Howe v. Lord Dartmouth and Dimes v. Scott, I may do so in the present case.

(1) 6 R. R. 96 (7 Ves. 137).

(3) 51 R. R. 328 (10 Sim. 636).

[ \*505 ]

<sup>(2) 28</sup> R. R. 46 (4 Russ. 195).

<sup>(4) 57</sup> R. R. 544 (1 Y. & C. C. C. 737)

1844. *Dec.* 18.

KNIGHT BRUCE, V.-C.

# BAYLIES v. BAYLIES.

(1 Coll. C. C. 537--548.)

Upon the construction of a devise of real property: Held, that an equitable tenant for life was entitled to the personal enjoyment of the property, upon giving security for the due fulfilment of the objects of testator's will.

In order to give effect to the claim of the tenant for life, the Court (in contravention of a previous letting by the trustees of the will to a person who had notice of the trusts) granted a receiver of the property, with a direction to let it to the tenant for life upon the terms of giving such security.

SIMON BAYLIES, being seised of a freehold, copyhold, and leasehold estate, consisting of a messuage or dwelling-house, farm, and lands, called the Leys, which he occupied and managed until the time of his death; and being possessed of considerable personal estate, made his will, dated the 23rd June, 1844, and thereby gave and bequeathed to his brother John Baylies, and his nephew John Boulton, [all his ready monies, securities for money, farming stock, growing crops, and effects, and all other his personal estate whatsoever and wheresoever, except his leasehold estate thereinafter bequeathed, upon trust, as soon as conveniently might be after his decease, to sell, and convert the same into money, and to pay all his just debts, funeral and testamentary charges and expenses, chief rents, and land-tax, and also the costs and expenses of renewing such of the lives as at the time of his decease, should have fallen in and become renewable upon his copyhold and leasehold estate in the parish of Alvechurch, or either of them, and then to retain thereout the sum of 10l. for draining tiles, to be used by them, his said trustees, where they thought proper, upon and about his said real estate, and after the several payments and deductions aforesaid, then upon trust, that they, his said trustees, should divide the whole of the said trust funds arising from his said personal estate, equally between his wife Elizabeth Parker Baylies, the said John Baylies, the testator's sister Elizabeth Boulton, widow, and Hannah Wilson, wife of John Wilson, share and share alike, as tenants in common, and not as joint tenants. And the testator gave, devised, and bequeathed all and singular his freehold, copyhold, and leasehold estates situate in the said parish of Alvechurch, or elsewhere, and all other his real estate, unto and to the use of the said John Baylies and John Boulton, their heirs, executors, administrators, and assigns, according to the respective natures and qualities of such estates, respectively, upon trust, to let and set, and receive, and take the yearly rents, issues, and

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profits arising therefrom, as and when the same should become due and thereout, in the first place, from time to time, so often as any life or lives should (after his decease) drop or fall in, pay and discharge the costs of renewal of or of putting any new or other life or lives in the place or stead of such life or lives so dropped or fallen in, as aforesaid, and, in the next place, to pay all costs and expenses of keeping the said hereditaments and premises in good and tenantable repair and condition, and all annual outgoings thereout; and after the several payments aforesaid, then upon trust to pay the remainder of the said rents, issues, and profits, as and when the same should become due and be received, unto his said wife, the said Elizabeth Parker Baylies, for her life, for her separate use, without power of anticipation; and after the decease of his said wife, upon trust either by sale or mortgage of all or any part of his said freehold, copyhold, and leasehold estate, or by such other ways and means as they or he should think best, to raise the principal sum of 1,000l., and stand possessed thereof, in trust for such person or persons as his said wife should, by deed, or will, appoint, notwithstanding coverture, and, in default of appointment, in trust for her next of kin, according to the Statute of Distributions; and subject thereto upon trust to convey and assure all his said freehold, copyhold, and leasehold estate unto and to the use of, or in trust for the said John Boulton and the testator's nephew Richard Boulton, their heirs, executors, administrators, and assigns, equally as tenants in common, and not as joint tenants, to whom he thereby devised and bequeathed the same accordingly].

The testator died on the 24th of June, 1844, and his will was proved by the executors in November following.

The bill was filed by the testator's widow against the executors, and the other legatees and devisee named in the will, (the latter defendants being served with copies of the bill), and (by amendment) against one Richard Burman. After stating that the defendants John Baylies and John Boulton had proved the will, taken possession of the testator's personal estate, paid his debts, and retained or ought to have retained a considerable residue in their hands, the bill alleged that they had taken possession of the title-deeds of the testator's freehold, copyhold, and leasehold estates, so as aforesaid devised to them, and ought either to have permitted the plaintiff, who was entitled during her lifetime, to receive the rents and profits thereof under the trusts of the will, subject to

[ 5**4**0 ]

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[ \*541 ]

such payments thereout as in the said will mentioned, to occupy the said estates at a fair rent and on giving proper security, or else ought to have let the estates to proper and responsible tenants at the best rent that could be procured; but that instead of so doing, the defendants John Baylies and John Boulton formed a scheme of letting the farm and lands, called the Leys, to the defendant Richard Burman, a relative of theirs, at a rent far below the real value of the property, although Burman was not a responsible or eligible tenant, and although they were well aware, as the fact was, and as the plaintiff had informed them, that she, with her said late husband, had been in the occupation of the farm for twenty years, and up to the time of her husband's decease, and had for all that period dwelt in the dwelling-house, and was anxious to remain in possession of the farm, and would have given full and sufficient security for keeping the same in proper repair and for payment of the fines, or would have become and had offered to become tenant thereof at the full annual value of the premises; and, further, \*that the defendants, in pursuance of such plan or scheme, concealed from all the persons in the neighbourhood who would have been likely to offer to become tenants, their intention of turning the plaintiff out of possession, and of letting the farm to a stranger, and that they privately entered into a negotiation with the defendant Burman for letting to him the farm and lands at the inadequate rent of 158l. per annum. The bill also contained a charge that the defendant John Baylies had, inconsistently with his duty as trustee, turned his own cattle, and allowed other persons to turn their cattle on the farm while in the plaintiff's possession.

The bill prayed that the will might be established &c., and, if necessary and proper in this suit, that accounts might be taken of the personal estate and of the rents of the real estate of the testator possessed by the defendants, the executors, the plaintiff being willing to be charged with an occupation rent for the farm during the time of her occupation; and, if necessary and proper in this suit, that the testator's assets might be administered &c. And in case it should appear that any agreement for letting the farm had been entered into between the executors and Burman that the same might be declared void; and that the plaintiff or some proper person, might be admitted a tenant upon giving proper security for repairs and payment of renewal fines, &c. And that in the meantime the defendants John Baylies and John Boulton might be

restrained by injunction from letting the aforesaid farm and lands to Burman at the aforesaid rent of 158l., or from otherwise letting, setting, or disposing of the said estates, without the direction or until the further order of the Court, and also from permitting Burman, his labourers, agents, or workmen to enter into or to continue in the possession of the farm and lands called the Leys, and from permitting any person other than the plaintiff, or such other person or \*persons as should, under the order of the Court, become tenant or tenants of the testator's estate, to enter into or continue in such possession, or to turn cattle into or upon the said farm and lands or any part thereof; and that Burman, his labourers, agents, and workmen might be in like manner restrained from entering into and continuing in such possession, and from turning cattle into or upon the said farm and lands, &c., and for a receiver.

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f \*542 ]

A motion was now made for an injunction, pursuant to the prayer of the bill. Amongst the affidavits in support of the charges of the bill were those of two persons of good property, who had offered to give 2001. per annum for the farm.

In opposition to the motion, the trustees, by their affidavits, stated, that in July or August, 1844, having previously informed the plaintiff of their intention so to do, they employed Thomas Holyoake, a surveyor of experience, to make a valuation of the testator's messuage, farm, and lands, for the purpose of letting That, on the 29th August, Holyoake valued the property at the sum of 158l. per annum, exclusive of tithes, which he valued That, after the testator's death, several persons (who were named) were informed by the defendants of their intention to let the property, and that some of such persons applied to become tenants. That about a month after their applications were made, viz. on the 24th of September, the deponents agreed with Burman to let him the testator's messuage, farm, and lands at Holyoake's valuation, viz. 158l. per annum, exclusive of the tithes, valued at 28l. per annum, making together 186l., on condition that the due payment of the rents and fulfilment of the covenants should be guaranteed by John Holbecke, and that a proper agreement should, when prepared, be executed. That a day or two afterwards, John Boulton informed the plaintiff that he and his co-trustee had agreed to let the farm to Burman \*at Holyoake's valuation, and to take the security of John Holbecke for the payment of rent and performance of covenants; upon which the plaintiff only observed-

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BAYLIES BAYLIES. "I think you should not have let it to a relative." That Burman was not a relative of either of the deponents. That previously to the 29th of September, the plaintiff permitted the deponents peaceably to carry on and manage the farm, &c., and to turn cattle thereon when they thought necessary, and that she appeared to be making arrangements for quitting the premises, and had applied to the deponents for the refusal of a house in Alvechurch. That, on the 30th of September, John Boulton delivered to the plaintiff a copy of Holyoake's valuation, and on the same day, Burman, by the direction of the deponents, took possession of the farm, except the dwelling-house and garden, which were still occupied by the plaintiff. That it was not until the 7th of October that the plaintiff gave notice to the deponents that she was willing to take the farm upon equally advantageous terms as any other person.

According to the affidavit of the defendant John Baylies, the property of Burman consisted of about 400l. cash, his farming stock and household furniture, and a reversionary interest in one-tenth of forty acres of freehold land.

The following agreement, signed by the defendants, the trustees, and Burman, was produced in support of their case: "Memorandum of agreement made this 24th day of September, 1844. The executors of the late Mr. Simon Baylies agreed to let, and Richard Burman agrees to take, the Leys farm and house, outbuildings, &c., thereon, containing 107a. 1r. Op. together, be the same more or less. Whereas the said executors have ordered their solicitor, Mr. Browning, to prepare an agreement according to the usual form of agreements, and such covenants and conditions to be inserted therein as they the said executors have given him instructions, for the good and husbandlike management of the said farm, (which agreement) the said \*Richard Burman does hereby agree to execute such agreement so soon as it is complete. As witness our hand," &c.

The plaintiff, by her counter-affidavit, stated that no notice was ever taken by the defendants, the trustees, of the applications of those persons who had offered to become tenants of the farm, but that she believed that they were all more eligible than Burman. She admitted that, on the 16th of September, John Boulton had informed her that the farm had been let to Burman at Holyoake's valuation, but she stated that he did not then tell her what rent Burman was to give, and that she never was informed upon that point until

the 30th of September when the copy of Holyoake's valuation was

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delivered to her. That this accounted for her not having given notice of her desire to take the farm until the 7th of October. That her apparent acquiescence with respect to the cattle, &c., arose from her belief that the trustees were acting in execution of the trusts of the will. She admitted that she was in error in calling Burman a relative of the trustees, the fact being, that his wife was the daughter of Holbecke, who was the first cousin of Elizabeth Boulton, the mother of the defendant John Boulton.

Boulton, the mother of the defendant John Boulton.

It was stated at the Bar, and not contradicted, that a few days after the bill was filed, an action of ejectment was brought against

Mr. Russell and Mr. De Gex, for the motion.

the widow on the joint demise of the trustees and Burman.

Mr. Wigram and Mr. Rogers, for the defendants, the trustees, contended that it was not competent to the widow, although equitable tenant for life, to insist upon having the personal occupation of the property. Upon the true construction of the will, the trustees were to have \*a discretionary power of managing it: Tidd v. Lister (1). The trustees having the legal estate, had demised the property at a fair rent to Burman, and they had a right to do so.

Mr. Cooper, for the defendant Burman:

There is no evidence that this defendant had notice of the will.

(THE VICE-CHANCELLOR: I shall assume that he had notice; at least unless he swears the contrary.)

Assuming that he was aware of the trusts of the will, can he become party to anything in the nature of a breach of trust by accepting a lease of this farm as a tenant from year to year? It is clear, on the face of the will, that the trustees were to have the active management of the property. In the very commencement of it there is a direction that portions of the personal estate shall be applied by them to the benefit and improvement of this property in a particular manner. There are, no doubt, cases where, although the trustees have a discretion as to the management of the property, yet the cestui que trust has an option whether he shall occupy it. But there is no particular ground for allowing that option here.

The Vice-Chancellor, in the course of the argument, referred,
(1) 21 R. R. 323 (5 Madd. 429).

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BAYLIES v. BAYLIES, upon the construction of the will, to the case of Blake v. Bunbury (1); intimating an opinion, that, in the present case, it would be consistent with the intentions of the testator to allow the widow to have the personal enjoyment of the property for her life, upon giving the proper security. Upon the question of security his Honour referred to Jenkins v. Milford (2).

Mr. Russell, in reply.

### THE VICE-CHANCELLOR:

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The only doubt which I have \*had in this case is, as to the form in which relief ought to be granted upon the present motion. As to the merits of the case I think there is no difficulty.

I will assume for the present purpose, without deciding the point, that the trustees had the power, legally and equitably, of letting the farm in question without the consent of the widow. If they had that power, it was necessary that they should exercise it without forgetting their position as trustees—without forgetting that they had the rights and interests of others under their care. Not relying particularly upon Mortlock v. Buller (3), Ord v. Noel (4), or other cases of mere specific performance, I apprehend it to be clear in this Court, that contracts and dealings of trustees, with respect to trust property, are open to many considerations which do not belong to contracts and dealings of men dealing with property of their own, but very especially in cases where they are dealing with those who have notice that they are trustees. In the present case, I consider that Burman, when he dealt with Baylies and Boulton, had notice that they were acting under this will as trustees of it.

Considering the parties in this position, has there been a letting which, assuming the true construction of the will to be such as I have stated, it is possible for this Court to recognise?

A written contract is entered into between the parties, of a particular description. Neither term nor rent, neither the commencement nor the end of the tenancy, nor the conditions upon which the farm was to be let, are mentioned; and this is said to be a letting by trustees. (His Honour here read the memorandum. See ante, p. 172.)

It cannot be maintained that this alone is a letting; but it is said that the rent and the term only are not in writing. If so, there is

<sup>(1) 1</sup> R. R. 111 (1 Ves. Jr. 514).

<sup>(3) 7</sup> R. R. 417 (10 Ves. 292).

<sup>(2) 21</sup> R. R. 262 (1 Jac. & W. 629).

<sup>(4) 21</sup> R. R. 328 (5 Madd. 438).

this difficulty in the agreement, \*that it is partly in writing and partly by word of mouth. That such an agreement may not exist in a case not within the Statute of Frauds, I will not say. But it is at least a matter of some difficulty—some embarrassment—when parties deal by means of agreements of that description. Assuming, however, that this was proper, it is perfectly plain that the agreement was to be afterwards put completely into writing; it was not to remain oral. The trustees had that degree of prudence; and the least to be expected was, that, before the tenant was in possession, the terms should be in writing. But he was let into possession without the terms being reduced to writing, and, he being in possession, they were left to deal with him as they could.

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I am disposed to think that, in this case, (without regard to the character of trustee sustained by one of the parties), there was no letting at all. But, even if there was that which, in one view of the case, might be deemed a letting, I think that, as against trustees and a party having notice of the trust, it would be discreditable to a court of equity to treat it as a serious question, whether such a transaction as this ought to stand.

The question, then, is, whether the plaintiff is entitled to the possession of this property for her life. Upon a just interpretation of the will, I think that, giving security for the due performance of the objects of the will, and for dealing with the property in a reasonable and right manner, she ought not to be disturbed in the possession. There may, however, be some difficulty in point of form; not that a mandatory injunction is not within the powers of this Court; but delicacy and caution are required in issuing it. Considering the situation in which this property is placed, and that a receiver is prayed by the bill, I think that the mode of arriving at substantial justice, \*without being impeded unnecessarily by form, will be (the plaintiff consenting) to—

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Refer it to the Master to appoint one or more proper person or persons to be, without salary, a receiver or receivers of the freehold, copyhold, and leasehold, (giving recognizances in the usual manner); and if the Master shall approve of any person or persons to be proposed by the plaintiff, let such person or persons be appointed by the Master in preference, and let possession of the farm be delivered to such person or persons when appointed. Let the plaintiff give such security as shall be approved by the Master for the payment and discharge of the costs of renewals, and of putting in any new

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or other life or lives, as in the will mentioned, and for payment and discharge of all costs and expenses of keeping the property in good and tenantable repair and condition, and all annual and other outgoings, until her death or further order. Let such receiver or receivers give the plaintiff the option of being the tenant of the property; reserving to such receiver or receivers power to inspect the state and condition of the property. Till the appointment of a receiver, the possession of the property to remain as it is. order to be without prejudice to the question, whether Burman is or is not entitled to receive any payment or compensation, and, if any, from whom.

The Vice-Chancellor afterwards said, that he was of opinion that the evidence did not establish that the plaintiff sanctioned the conduct of the trustees. In order to arrive at that conclusion, he should have required much stronger evidence that she understood her rights and meant to bind them.

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ASHBY v. ASHBY.

(1 Coll. C. C. 549-554; S. C. 14 L. J. Ch. 86; 8 Jur. 1159.)

Legacies held to be charged by the will of a testator upon his real estate in exoneration of his personalty.

EDWARD ASHBY, late of Medbourn, in the county of Leicester, by his will, dated the 4th May, 1911, gave as follows: "All that my messuage or tenement, with the outbuildings and appurtenances to the same belonging, situate, and being in Medbourn aforesaid, and now in my own occupation, and all my closes, open fields, lands, commons, and real estate in Medbourn aforesaid whatsoever, with the appurtenances, and also my moiety or half part of a close of pasture or ground inclosed in Halloughton, in the said county of Leicester, the whole of which close contains three-and-a-half acres, or thereabouts, I give to my affectionate wife, Sarah Ashby, for and during the term of her natural life; and, subject thereto, I give and devise my said messuage or tenement, buildings, and appurtenances to the same belonging, closes, open fields, lands, commons, and all my real estate in Medbourn aforesaid, and also my moiety or one-half part of the closes or ground inclosed, with the appurtenances, situate in Halloughton aforesaid, to my eldest son, William Ashby, and to his heirs and assigns for ever, but charged and chargeable, nevertheless, with the payment of the

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legacies hereinafter mentioned to my two sons, Thomas and Edward, and my daughter Elizabeth. Also, I give to my said son, William Ashby, my silver half-pint cup, and desire my wife will give to my daughter Elizabeth two silver table-spoons. I give to my said two sons, Thomas Ashby and Edward Ashby, the sum of 100l. a-piece, and to my daughter Elizabeth, the wife of Edward Palmer, the sum of 801., which said several legacies I will and direct shall be paid to my two sons, Thomas and Edward, and my daughter Elizabeth, at the end of twelve months after the decease of my said wife, by my said son, William Ashby, but without any interest for the same; and I hereby charge my messuage, lands, and \*real estates in Medbourn and Halloughton aforesaid with the payment of the said legacies to my said two sons and daughter accordingly. And, if any or either of them, my said two sons, Thomas and Edward, and my said daughter Elizabeth, shall happen to die before his, her, or their said legacy or legacies shall become payable by this my will, leaving one or more child or children, I give the legacy or legacies of him, her, or them so dying, unto his, her, or their children, equally to be divided between and amongst such children, if more than one, share and share alike; but, in case either of them, my said sons, Thomas and Edward, or my daughter Elizabeth, shall depart this life before his, her, or their said legacy or legacies shall become payable, and without leaving any child or children living, I give the legacy of him, her, or them so dying unto the survivors or survivor of them, my said two sons and daughter, equally to be divided between such survivors, share and share alike. And all my household goods and household furniture, ready money, and securities for money, horses, cows, sheep, and other cattle, and all other my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, not by me before disposed of, (after and subject to the payment of my just debts and funeral expenses, and the charges and expenses of proving this my will), I give and bequeath unto my said wife, Sarah Ashby, and my said son, William Ashby, equally to be divided between them, share and share alike, and to their executors and administrators, to and for his, her, or The testator appointed his wife, Sarah their own use and uses." Ashby, and his eldest son, William Ashby, joint executrix and executor of his will.

Upon the death of the testator, his will was duly proved by his representatives.

Sarah Ashby entered into possession of the real estate devised to **B.R.—VOL. LXVI.** 12

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her for life, and continued in possession until her decease, which took place on the 2nd October, 1827. \*On her death, William Ashby entered into possession of the premises, and died intestate in November, 1829.

The bill was filed by Thomas Ashby and Elizabeth Palmer, two of the legatees named in the testator's will, (Thomas Ashby being also administrator de bonis non of the testator, and both plaintiffs being the legal personal representatives of Sarah Ashby, and the plaintiff Elizabeth Palmer having survived her husband), against the dowress, and infant heir-at-law of William Ashby, and other persons interested in the real estate devised by the testator, praying that the will might be established, &c., and that the legacies might be raised by a sale or mortgage of the devised estate.

The first question was, whether the real estate was charged by the will with payment of the legacies in exoneration of the personalty.

Mr. Heathfield, for the plaintiff.

Mr. Renshaw, for the defendants, except the heir-at-law of William Ashby:

The circumstance that the real estate is charged with the legacies after the death of the testator's wife, is not sufficient to show that the real estate alone was to be charged. It must be shown clearly that the personalty was not to be charged. William Ashby, the devisee in remainder of the real estate, was not only an executor, but legatee of a moiety, of the residuary personal estate. The gift of the residue comprises all the testator's personal estate, "not before by me disposed of." Part, therefore, must have been disposed of in payment of legacies, unless those words are to be referred only to the silver cup and spoons.

Mr. Kinglake, for the remaining defendant.

#### THE VICE-CHANCELLOR:

[ \*552 ]

The question is, whether there \*is an intention apparent in this will, that the three legacies given to the testator's two sons, Thomas and Edward Ashby, and his daughter Elizabeth Palmer, should be paid out of the real estate alone. He gives his real estate to his wife for life; subject to that, he gives his real estate to his eldest son, William Ashby, in fee, but "charged and chargeable, nevertheless, with the payment of the legacies hereinafter mentioned to

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my two sons, Thomas and Edward Ashby, and my daughter Elizabeth." Now, it may be, that, had the will ended here, the land would only have been an auxiliary fund for payment of these legacies; but the testator goes on: "Also, I give to my said son, William Ashby, my silver half-pint cup, and desire my wife will give to my daughter Elizabeth two silver table-spoons." It occurred to me, at first, that this direction, that the wife should give the spoons, (considering that the personal estate is given generally to the wife and eldest son), might have the effect of neutralizing the observations which I am about to make as to the eldest son paying the legacies. But I do not think that it ought; the probability is, that the testator had more spoons than two, and he might wish to give the wife the power of selecting those which the daughter was to That direction does not, I think, vary the inference as to the testator's intention to be collected from other parts of the will. then gives the three legacies; which are given in the common form of pecuniary legacies, but are to be paid, after the death of his wife, "by my said son William Ashby," to whom he has given the real estate after the death of his wife. Now, I do not say that that alone is decisive upon the question, but it is very strong. Then, after charging the legacies on the real estate, and giving certain directions respecting them, he concludes his will thus: "All my household goods and household furniture, ready money, and securities for money, horses, cows, sheep, and other cattle, and all other my personal estate and effects whatsoever \*and wheresoever, and of what nature or kind soever, not by me before disposed of, after and subject to the payment of my just debts and funeral expenses, and the charges and expenses of proving this my will," not mentioning the legacies, "I give and bequeath unto my said wife, Sarah Ashby, and my said son, William Ashby, equally;" William alone being the person by whom the legacies were before directed to be paid. Upon the whole. I think that this particular will, taken altogether, does show that the testator intended these three legacies to be charged upon his real estate only.

[ \*553 ]

1844. Dec. 18, 19, 20.

Knight Bruce, V.-C.

# SMITH v. GREEN (1).

(1 Coll. C. C. 555-564.)

A first mortgagee, after the usual notice given him by the second mortgagee to redeem, files a bill of foreclosure. At the end of the term mentioned in the notice, the second mortgagee tenders the mortgage-money and costs to the first mortgagee, which the latter declines to accept: Held, under all the circumstances of the case, that the first mortgagee ought to pay the costs of the suit after the tender.

A first mortgagee ought to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor.

By indentures of lease and release, dated the 10th and 11th February, 1824, John Green conveyed to the plaintiff and his heirs an estate, called the Droveway Estate, part of a larger property of which he was the owner, situate at Castle Eaton, in Wiltshire, by way of mortgage, for securing 950l., with interest at 5l. per cent.

In March, 1834, the plaintiff took possession of the mortgaged premises, and thenceforth received for them, through Lediard, his solicitor, a rent of 60l. per annum, payable yearly, with a deduction of 2l. 8s. per annum for land-tax. This arrangement continued until Lady Day, 1842.

By an indenture of the 20th April, 1826, Green mortgaged the premises for a term of 500 years to Trotman, to secure 500l. and interest. That mortgage ultimately vested by assignment in the defendant Mullings.

By an indenture of the 23rd March, 1830, Green again mortgaged the premises to the defendant Bevir, to secure 2,000*l*. and interest. And lastly, by an indenture of the 13th October, 1831, he further mortgaged the premises to some ladies named Halgood, to secure 560*l*. and interest.

In November, 1841, John Green died.

On the 15th February, 1843, the defendant Mullings received the following letter from Alexander Smith the brother of the plaintiff: "I am requested by my brother to apply for 47l. 10s., being the interest of 950l., advanced to the late Mr. Green of Castle Eaton. If you should not be authorized to pay it, you will be so good as to inform me who the executors of the late Mr. Green are, that I may apply to them." In reply to this letter, Mullings, on the same day, wrote as follows: "Sir,—It was always supposed that Mr. Lediard held the mortgage you allude to upon Mr. Green's estate, and notice was given to him at the time the last payment of interest was made,

<sup>(1)</sup> Pearce v. Morris (1870) L. R. 5 Ch. 227, 39 L. J. Ch. 342, 22 L. T. 190.

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GREEN. [ \*556 ]

that only \*41. per cent. would in future be paid, which rate, I hope, your brother will be content to take. I shall be ready to pay both principal and interest at any time, upon having the deeds delivered up to me, and you will be good enough to say as much to your brother." In answer to this letter, Alexander Smith, on the same day, wrote as follows: "SIR,-My brother has all along had the deeds of the property with a regular conveyance made by Mr. Lediard, and the agreement is 5l. per cent. My brother will take nothing less. If there is any difficulty about getting the interest, he will be obliged to employ his solicitor, as he wants the interest, and it was due on the 10th. My brother has no objection to deliver up the deeds when the principal is paid, but it is usual to receive half-a-year's notice from the executors." Mullings's reply was as follows: "SIR,-Mr. Bevir is employed by the executors of Mr. Green, and I have nothing whatever to do with the business, further than having a mortgage upon the estate. Your brother allowed Mr. Lediard to act as his agent, and it seems to me that your brother would be bound by Mr. Lediard's acts. In reference to the matters in question, I have repeatedly offered to pay off your brother's mortgage for the last two years, which I am entitled to do as second mortgagee, and I shall be glad to do so at Lady Day next, or sooner if wished."

In consequence of this correspondence, a notice in writing, dated the 18th March, 1843, and signed by the defendant Bevir (who was a solicitor) on behalf of himself and Mullings and the subsequent mortgagees, was served upon and accepted by Alexander Smith, as the agent of his brother. The notice was to the effect, that, at the expiration of six months, or sooner if it should be agreeable to the plaintiff to receive it, it was intended to pay off the principal and interest due to him on mortgage of the Droveway Estate.

Soon after the service of this notice, three different applications were made by the plaintiff through his solicitor \*to the defendant Mullings for payment of the interest, with an intimation that, on failure of payment, a bill would be filed. On the two first occasions, the defendant's reply was to the effect that he was ready to pay both principal and interest. On the last occasion, the 31st March, he said that the principal and all interest would be paid off at the expiration of the notice, and that the tenant would be paying his rent in May then next, when the interest then due would be paid.

On the 20th April, 1843, the plaintiff filed his original bill for a foreclosure of the premises against the heir and devisees of Green, [ \*557 ]

SMITH T. Green. the defendant Bevir and other parties; omitting to make Mullings a defendant, by reason, as he afterwards alleged by his supplemental bill, that he considered Mullings was acting only in his professional character and as agent for other parties.

On the 29th May, the tenant of the premises paid to the plaintiff's solicitor 57l. 12s., being the amount of a year's rent to Lady Day, deducting land-tax.

On the 31st May, the defendant Mullings wrote a letter of that date to the plaintiff's solicitor in these terms: "Sir,—If you will favour me with an account of the interest and costs due to your client, Mr. George Smith, after deducting the rent received, I will endeavour to get the account agreed to by Mr. Bevir, and pay the balance with the principal money, on the execution of the transfer of the mortgage, the draft of which I send for your perusal. I am second mortgagee of this estate, and have the first right to redeem and call for a transfer of Mr. Smith's mortgage, but I shall be ready to obtain a written request or consent from Mr. Bevir and Mr. Green to your clients' making the transfer to me, if you so desire. It seems to me, however, that your client may transfer to any person without incurring any risk beyond the costs of the defendants to his bill; which will be disposed of by their consenting to the payment of his costs."

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The draft referred to in this letter was that of a simple transfer of the mortgage from the plaintiff to the defendant Mullings. The draft was shortly afterwards returned to Mullings by the plaintiff's solicitor, with the addition of the names of the defendants Bevir and Green as parties to it. Mullings acquiesced in this alteration, and caused an engrossment to be made from the draft as so altered, which engrossment was executed by the defendant Bevir. Green, however, refused to execute it.

An attempt was then made by the defendant Bevir to obtain the concurrence of Green; but that attempt failing, he, on the 26th August, wrote a letter of that date to the plaintiff's solicitor in these terms: "Sir,—As I find, after taking an express journey to Hungerford, that Mr. Green is not to be prevailed on to execute the transfer to which I have given my signature, or to concur in any other arrangement for terminating this suit, and as it is objected for your client to assign his mortgage to Mr. Mullings as not a party to the suit without such signature, I propose, in order to save myself further expense, to pay off your client his principal, interest, and costs, and also Mr. Green's costs, and to take a transfer of the

mortgage to myself, and therefore beg to submit to you the accompanying draft of such transfer for your perusal and modification in any way you think proper, and trust your client will not be advised to prosecute the suit, which cannot be attended with any possible advantage to himself. I am prepared, and will wait upon you any day, however early, to pay the principal and interest, and to deposit a sum for the costs, as well Mr. Green's as your client's, till they can be ascertained. Should not this proposal be acceded to, it must be considered without prejudice."

On the 30th August, the defendant Bevir, being in London, pressed the agents of the plaintiff's solicitor for a reply to the lastmentioned letter. On the following day the agents wrote as follows: "If the defendant wants to \*redeem the plaintiff, he must apply to the Court in the usual way. We beg he will not delay putting in his answer by the time fixed by the Master."

On the 2nd September, the defendant Bevir received a letter from the plaintiff's solicitor, in these terms: "Sir,—Upon your producing a consent from Mr. Green to dismiss, I am willing for my client to convey to you or any one else; and if any motion is made for the purpose of terminating the suit, I will not offer any opposition."

On the same day the defendant Beyir replied to the last-mentioned letter as follows: "Smith v. Green. SIR.—If Mr. Green's consent were necessary for the dismissal of this bill, I would not ask you to dismiss it without; but as you are already aware that Mr. Green's consent cannot be obtained, it seems useless for you to make that a condition. The only objection to the dismissal of the bill, as regards Mr. Green, is the liability of your client to his costs, and as I have been willing to deposit with you the amount before the motion to dismiss (which is a hand motion merely) is made, there is an end, I submit, to that objection. I went to town on Wednesday for the purpose of giving instructions for my answer, and while there, caused an application to be made to your agents, in the hope it would not be required; but in consequence of their written reply (a copy of which you have on the other side) my answer has been drawn and the draft forwarded to me to-day."

The defendant Bevir not having received any reply to the last-mentioned letter, he, on the 5th September, 1843, wrote and sent to the plaintiff's solicitor a letter in these terms: "Smith v. Green. Sir.,—I am exceedingly desirous of getting rid of this suit, and will make one more effort to obtain Mr. Green's consent to the dismissal of this bill; but I wish previously to know whether, if I should

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succeed in procuring it, you will consent to your client's executing the transfer to me, the draft of which has been submitted to you."

The plaintiff's solicitor replied by letter of the same date, as follows: "Sir,—I consider my note of the 2nd instant a sufficient guarantee as to what course the plaintiff would take in the event of your having Mr. Green's consent to dismiss, and that note will be answer to yours of this date. As to the form of the transfer, the plaintiff will execute such as he shall be advised, and if you desire the draft to be returned, it shall undergo such alterations as may be considered requisite, but I cannot stay the proceedings pending such negotiations."

On the receipt of this letter, the defendant Bevir made an application to the solicitor of the defendant Green, requesting his consent to the dismissal of the bill upon payment of his costs, but without success.

On the 18th September, the defendant Bevir, accompanied by Thomas Mullings, the brother of the defendant Mullings, went to the office of the plaintiff's solicitor, and producing 1,000l. in Banknotes, stated that he was about to go to London to put in his answer, but, before doing so, tendered the notes in payment of the principal and interest due on the mortgage; and added, with respect to costs, that he would either deposit in the hands of the solicitor of the plaintiff a sum for their payment, or would give an undertaking for that purpose. The witness Mullings added, that his brother would join in the undertaking. The plaintiff's solicitor declined to receive the money, without, as the witness for the defendants stated, assigning any reason; but according to his own evidence, on the ground, as he expressed it, that the mortgagor having appeared to the suit, he could not suffer his client to be redeemed, "except upon the terms as in the common case of a foreclosure suit."

On the 22nd September, the plaintiff filed a supplemental bill against Green, Bevir, Mullings, and the Halgoods: alleging, by the way of supplemental matter, that, since the filing of the original bill, the defendants Bevir and Mullings, \*who were mortgagees of the adjoining property belonging to Green, had removed and displaced the fences and boundaries of the Droveway Estate, so as to render it impossible for the plaintiff to recognize or identify his mortgaged premises with sufficient certainty to enable him to recover them in ejectment, or to proceed to a sale. These allegations, as well as other matter introduced by way of supplement, were totally unsupported by evidence.

[ \*561 ]

The supplemental suit now came on for hearing.

Mr. Russell and Mr. Whatley, for the plaintiff.

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Mr. Wilcock, for the defendants, the Greens.

Mr. Wigram and Mr. Parry, for the defendant Mullings.

Mr. Swanston and Mr. Bevir, for the other defendants.

In the course of the argument, the case of Cliff v. Wadsworth (1), was referred to.

### THE VICE-CHANCELLOR:

In this case, which, during portions of Wednesday, yesterday, and the present day, has occupied the public time to an extent that, considering its nature, I had not been prepared to think possible, the litigation is substantially about nothing except its own costs. The plaintiff sues as first mortgagee of the estate in question. He is admitted to be so. It is admitted that money is due to him on his security. He has asked, by his counsel at the Bar, for an ordinary decree of foreclosure, and for nothing else. It is admitted that he is entitled to an ordinary decree of foreclosure, except so far as such a decree allows the plaintiff to add to his security the costs of the suit; the defendants contending that the plaintiff is \*not entitled to any, and ought to pay some, part of the costs of the suit. The costs of the suit form, therefore, the whole subject of contest; before entering upon which it is as well to mention, that the total amount of principal due to the plaintiff, when his original bill was filed, is admitted on all hands to have been 950l.; that this sum carries interest at 5l. per cent. per annum; but that during some time the plaintiff had consented to receive, and did receive, interest at the reduced rate of 4l. 10s. per cent. per annum; and that one year's interest at the larger rate became due on the 11th February, 1843, which interest of one year and the subsequent interest at the same rate were due, and formed the total amount of interest due, when, in April, 1848, the original bill was filed, as all parties also admit. They admit, likewise, that a sum of 57l. 12s. was received by the plaintiff, on account of interest, in the month of May, 1843. It is not clear, that, when the original bill was filed, anything was due to the plaintiff for costs. Considering what took place in 1843, before the original bill was filed,

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[ \*563 ]

especially the notice of the 18th March, 1843, I am not satisfied that it was a reasonable step to file that bill. I am not satisfied that it was a measure which ought to have taken place. assuming the commencement of the original suit to have been justifiable, I am under the necessity of looking at what took place in the interval between that time and the 19th of September following, especially on the 18th of that September, and in the preceding month. The offers and communications made in that interval were such as, in my opinion, ought to have had the effect of stopping all litigation upon the 18th of September, 1843. I think that the plaintiff, if he had been willing to cease on that day from litigation, might have done so on fair and reasonable terms, providing for him and securing to him all that he ought to have The perseverance, the useless perseverance, by the wished. plaintiff in litigation after that day, it is easier to regret than to \*justify; nor can I say that it was justifiable. I have attended to what has been said by the plaintiff's counsel as to an application under the statute of Geo. II., and as to the right which a mortgagee may be thought to have to refuse to assign, as assigning is distinguished from re-conveying. But those considerations do not. in my view, make any difference. Mr. Mullings and Mr. Bevir, or either of them, may or may not have been able and entitled to apply to the Court under the statute. For the purpose now under consideration, they were not, in my opinion, under any obligation to take that course. And, as to assigning, the strict law may, in a sense, be as stated by the plaintiff's counsel. But it must be remembered, that assigning to a stranger, and assigning to a man who has a right to redeem, are different things; and it must be remembered also what species of conveyance or assignment Mr. Smith will, if redeemed by Mr. Mullings in this suit, be under the necessity of executing. If the plaintiff had objected to assign his debt, so as, keeping it alive, to authorize his name to be used afterwards in an action, that objection, of however precise and rigid a kind, would, very possibly, have been thought sustainable. have not observed any trace of such a point having been taken; and to say that a first mortgagee ought not, without a judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor, where the second mortgagee does not desire the mortgagor's concurrence, is too much.

With my view of the case in other respects, it is scarcely material

to add that the supplemental bill, whether wholly or not wholly wrong on the face of it, appears plainly, upon the materials before me, to be groundless and untenable. It ought, in strictness, probably, to be dismissed; but, as this would produce inconvenience, from the circumstance that Mr. Mullings and the Misses Halgood \*are not parties to the other bill, and as the dismissal of the supplemental bill has not been asked,—has at least not been pressed,—I am not disposed to dismiss it. This is not the only ground upon which, if I make a decree in the form that I am about to state, the defendants should, I think, consent to it. If they decline consenting to it, I will reconsider the matter, and deliver to the Registrar other minutes, which may very possibly differ from these to some extent, in substance as well as form.

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[ \*564 ]

The plaintiffs and defendants admitting that the sum of 950l. principal money, with interest thereon at the rate of 5l. per cent. per annum from the 11th day of February, 1842, but not any greater arrear of interest, was due to the plaintiff on his security in the pleadings mentioned at the time of filing his original bill in these causes, and that the sum of 57l. 12s. was paid to him on account of interest in the month of May, 1843; and the defendant, Joseph Randolph Mullings, now offering to pay to the plaintiff, immediately on account, the sum of 800l., without prejudice to any question of account, . . . and the defendants consenting to this decree,-Refer it to the Master to take an account of what is due to the plaintiff for principal and interest on his mortgage security. Refer it to the taxing Master to tax the plaintiff his costs of these suits up to the 18th day of September, 1843, inclusive; and let such costs, when taxed, be added to the amount of such principal and interest due to the plaintiff. Let the taxing Master inquire whether any thing, and what, is due to the plaintiff for any and what costs, charges, and expenses properly incurred by him in respect of his mortgage security, not being costs of these suits, or either of them; and if the said Master shall find that any thing is so due, let the amount thereof be also added to the amount of principal and interest found due to the plaintiff for his debt; and upon the defendant, Joseph Randolph Mullings, paying unto the plaintiff what the said Master shall find due for such principal, interest, and costs, and for such costs, charges, and expenses, if any, within six months after the Master shall have made his report, at such time and place as the said Master shall direct, let the plaintiff

GREEN.
[ 2 Coll. 626,
in notis. ]

SMITH

convey and assign unto the said Joseph Randolph Mullings, or as he shall direct, the mortgaged premises. [And let the costs of these suits after the said 18th day of September, 1843, to the present time, when taxed, be paid by the plaintiff to the defendants. Reserve subsequent costs.]

1845. Jan. 25.

# WHITMARSH v. ROBERTSON (1).

(1 Coll. C. C. 570-576; S. C. 14 L. J. Ch. 157; 9 Jur. 125.)

KNIGHT BRUCE, V.-C.

By a marriage settlement certain stock in the funds was settled upon the intended husband and wife for their joint lives and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. There were four children of the marriage. The husband died. The wife married again. The second husband assigned the wife's life-interest for value. After the assignment, the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage: Held, that the power was well executed as against the assignee of the second husband.

By a deed-poll, dated the 8th January, 1845, under the hand and

seal of Anne Maria, the wife of William Mileham, reciting the settlement made on her former marriage, whereby a sum of 1,757l. Consols was assigned to trustees, upon trust for the husband and wife, and their issue, in the manner stated in the former report of this case (2); and reciting the other circumstances mentioned in that report, and that four of the children of Mrs. Mileham, by her former husband, two of whom had attained their majority, were about to be placed in business, and that Mrs. Mileham \*was desirous that the sum of 480l., or such other less sum as thereinafter mentioned, should be raised out of the trust fund in part of their respective expectant portion therein, in order that the same might be applied for their advancement and benefit; it was witnessed that the said Anne Maria Mileham, pursuant to, and by force and virtue and in exercise and execution of, the power or authority given or limited to her by the settlement, and of all other powers, &c., did, by that deed or writing, consent, direct, appoint, and request that the said trustees should forthwith raise, out of the said sum of 1,757l. Consols, the sum of 480l. sterling, or such other less sum as they should think proper, and should apply the sum so to be raised

(1) This case is open to the observation that the alienation of property, whether by voluntary grant or by operation of law, usually incapacitates the former owner from any subsequent

act in derogation of the previous grant or alienation.—O. A. S.

(2) See 57 R. R. 532 (1 Y. & C. C. C. 715).

[ \*571 ]

for the advancement and benefit of the four children, in manner in Whitmarsh the deed mentioned.

ROBERTSON.

Immediately after the execution of this instrument, notice of it was served on the trustees of the settlement; but they declined to act without the sanction of the Court.

A petition was accordingly presented on behalf of the four children for whom the advancement was intended to be made, praying that it might be declared, that, notwithstanding the marriage of Mrs. Mileham with her present husband, William Mileham, and also notwithstanding the indenture of the 4th April, 1837, whereby Mrs. Mileham's life-interest in the Consols was assigned by her present husband to the plaintiff, the power given to Mrs. Mileham by her former marriage settlement, of consenting to the advancement of the petitioners, was a valid and subsisting power, and was well executed by Mrs. Mileham by the deed-poll or writing of the 8th January, 1845; and that the trustees might be directed and empowered forthwith to levy and raise, out of the sum of 1,757l. Consols, the sum of 480l. sterling, or such other less sum as they should deem proper, in part of the petitioners' expectant portions therein, and to apply the same for the advancement and benefit of the petitioners, in manner in the said deed-poll \*or writing mentioned, or in such other manner as the said trustees should in their discretion think fit.

[ \*572 ]

## Mr. Shapter and Mr. Hanson for the petition:

The question is, whether Mrs. Mileham can consent to the trustees advancing the children, notwithstanding the claim of the plaintiff under the assignment of April, 1837. [They distinguished Jones v. Winwood (1) and Hole v. Escott (2).] In the former case the power was general, and such powers are, by the Bankrupt and Insolvent Acts, vested in the assignees. In the latter case, where the power was particular, the distinction between acts of law and acts of the party was preserved, the case being treated as an exception, on the ground of the construction favourable to creditors which is put on the Bankrupt and Insolvent Acts; and the vesting of the bankrupt's estate in his assignees being deemed equivalent These principles distinguish Noel v. Lord to a conveyance. Henley (3) from the present case. There, a tenant for life, with a power of advancing portions, assigned his life interest, and was

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<sup>(1) 51</sup> R. R. 218 (10 Sim. 150). (3) 29 R. R. 805 (M'Clel. & Younge,

<sup>(2) 48</sup> R. R. 63 (4 My. & Cr. 187). 302).

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[ \*574 ]

not allowed to defeat his own act by exercising the power. Here, the act was not that of the wife or the trustees, but of the husband. \* \* \*

Mr. Russell and Mr. Stinton, for the plaintiff, contended that there had been no execution of the power; for, although Mrs. Mileham had consented to the execution, the trustees had not executed it, and, moreover, declined to execute it, unless authorized by the Court. The power to consent was released by Mrs. Mileham's marriage: Badham v. Mee (1). The marriage was an assignment by Mrs. Mileham \*of her life interest unto her husband for a valuable consideration. The decision in Noel v. Lord Henley was in point, and must govern this case. Moreover, the appointment was of too large a sum. There was no authority to appoint a sum in cash at all, but only a share of the stock.

### THE VICE-CHANCELLOR:

I understand, in this case, that no instrument whatever was executed or signed by Mrs. Mileham between the marriage settlement upon her first marriage and her second marriage, and as, under the marriage settlement, she did not take her life interest after her first husband's death for her separate use, nothing occurred to make it an interest for her separate use. When she married, therefore, it was liable to all the incidents to which a life interest in personalty is liable, that belongs to a woman, not for her separate use, who marries without a settlement. But, as this life interest was derived under a particular instrument, it was, of course, liable to all the provisions affecting it contained in that instrument.

What would have been the effect upon the capacity of executing this power, if Mrs. Mileham, when a widow, had sold or incumbered her life interest, I desire particularly to be understood as not giving any opinion whatever. In point of fact, the sale was made by her second husband and herself, so far as she could join in the act, after the second marriage.

The first question then is, whether, if this sale had not been made, and the second husband and herself had done no such act, she could have exercised this power; that is, whether she could have effectually consented to the trustees acting under the advancement clause, without and against the consent of her second husband.

I am of opinion that she could; that this power of giving the WHITMARSH consent was a power with which marriage did not interfere; that ROBERTSON. \*she remained immediately after the second marriage at full liberty, and fully entitled, however it might prejudice that life interest to which her husband was entitled, or partly entitled, in her right, to exercise the power of consent; and that the trustees, without and against the consent of the husband, were authorized to give effect to that consent. If that is so, could a sale by the husband of the life interest make any difference? I am of opinion that it could not, and that a purchaser from him stood in no better situation than he would have done if that sale had not been made.

The next question is, whether the wife's concurrence in the instrument of sale made any difference. Generally speaking, a married woman cannot execute a deed; she can do no act of this description, except in respect of an estate settled to her separate use, or in the exercise of a power given to her. Separate use here is out of the question; there is no such thing. A power has been given to her, but the existence of a power only enables her to do an act under the power conformable to the power; it does not enable her to deal with the subject of the power in any manner not in conformity with the power. Dealing with the subject of the power in a manner not conformable with the power, she deals with all the disabilities of a married woman, and subject to all the considerations which affect the act of a married woman; and as the sale to Mr. Whitmarsh was an act not under the power, and not in conformity with it, I am of opinion that the act is in no sense to be considered her act, and is, as to her, a nullity. I am of opinion, therefore, that her consent is as effectual as it would have been if she had never married, and as if no sale had been made.

As the matter stands, however, and in a suit in which the only plaintiff is the purchaser, it may be difficult to give practical effect to this consent. I am of opinion, however, that it is not to depend upon the plaintiff's option \*merely, whether such a suit shall or shall not be confined in its operation to the administration of the trust as far as it regards the life interest. The decree hitherto made has been confined to the life interest, but the decree is not exhausted; there is a specific provision in it, that the hearing of the cause in all other respects shall stand over, with liberty for all parties to apply. It will be, therefore, a legitimate course that this cause should now be set down to be further heard, and being so set down, it will be a legitimate course, against the consent of the

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WHITMARSH c. ROBERTSON. plaintiff, and with the consent of the defendant, to administer the trusts generally; and in administering the trusts generally, it will be the duty of the Court, if a consent by Mrs. Mileham shall be regularly found upon which the trustees consider it consistent with their duty to act, to give effect to that consent, and to the willingness of the trustees to do an act consequent upon that consent.

His Honour then directed that the petition should stand over till a future day, on which an affidavit should be produced as to the number of children, and of the persons entitled to participate in the fund; and that, on the same day, the cause should stand in the paper to be further heard upon the subject of the decree reserved.

1845. Jan. 11.

KNIGHT BRUCE, V.-C. GARMSTONE v. GAUNT (1).

(1 Coll. C. C. 577—582; S. C. 14 L. J. Ch. 162; 9 Jur. 78.)

Sale of infants' property carried into execution under special circumstances.

William Weaver, being the lessee of five tenements holden for three lives under the Bishop of Worcester, devised all his freehold hereditaments to trustees and their heirs, upon the trusts following; (that is to say), as to one of the tenements held under the Bishop's lease, in trust, during the life of his daughter Mary, by and out of the rents and profits thereof, or otherwise, to keep the premises in repair and full lived, and to pay the fines and expenses attending any renewals and repairs thereof; and, subject thereto, to permit and suffer his said daughter Mary Weaver to receive and take the rents and profits thereof for her life; and from and after her decease, in trust for all and every the child and children of his said daughter Mary Weaver who should be living at her decease, and the issue of any child or children of his daughter Mary Weaver who should be then dead leaving lawful issue, (such issue to be entitled to his or her deceased parent's share), their, his, or her heirs or assigns.

The testator then devised the four other tenements to his four other children respectively, and their issue, in the same terms as he had devised the first tenement, except that, as to the third tenement, the words "or otherwise," and, as to the fifth, the words "by and out of the rents and profits thereof, or otherwise," were omitted.

The testator bequeathed the residue of his personalty to his children and their issue, and he appointed the before-mentioned

(1) In re Wells [1903] 1 Ch. 848, 72 L. J. Ch. 513, 88 L. T. 355.

trustees his executors; and he authorized and empowered his GARMSTONE trustees, when and as occasion might require, to surrender, or join in surrendering, the present or any future lease or leases of the said leasehold premises, for the purpose of obtaining a renewal or renewals thereof; and he directed that his trustees should stand seised of, \*and interested in, the leasehold estates to be comprised and granted in and by such new lease or leases as aforesaid, upon the same trusts, or as near thereto as might be, as were thereinbefore declared concerning the premises.

T. GAUNT.

[ \*578 ]

The present bill having been filed by some of the tenants for life against the surviving trustee, and against the other persons interested under the will, praying that the leaseholds might be renewed in such manner that the expense of the renewal might be properly apportioned between the tenants for life and remaindermen, having regard to the value of the property, the Master reported the following circumstances: That the lease held by the testator had been surrendered by the surviving trustee, and that, in consideration of a fine of 502l. 10s., the Bishop had granted a new lease; but that, the fine, fees, and expenses payable upon the granting of such new lease remaining unpaid, the new lease remained deposited with the Bishop's secretary, until the fine and interest thereon and expenses, amounting to 672l. 10s., should have been paid, together with future interest to the time of payment. That since this renewal another life had dropped. That the rental was 115l. per annum. That the solicitor of the plaintiffs had deposed, that, considering the circumstances, and the delay which would arise in procuring a further renewal of the lease, by reason that, until the other parties holding property under the original lease agreed to renew, the Bishop's steward would not fix the fine and expenses payable by the parties interested under the testator's will, which delay would involve the risk of the dropping of the two existing lives,—and also considering the amount of the fine and expenses on the last renewal,-the fine and expenses of further renewal would be so large that it would not be repaid by the increased purchasemoney on a sale of the premises. That the same solicitor had further deposed, that, the parties interested in the premises being all persons in very humble conditions in life, and \*several of them being infants, whose interests were reversionary, and there being no fund wherewith to pay the fines, interest, and expenses, there was no way by which, having regard to the testator's will and other circumstances, the same could be raised, unless it were determined to sell the property 18

「 \*579 T

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GARMSTONE immediately, and some person could be found willing to advance the same, upon the terms of being repaid the amount of such advance, with interest thereon after the rate of 5l. per cent. per annum, out of the proceeds of such sale, to enable the parties to obtain possession of the lease, and proceed to a sale thereof, as thereafter mentioned. And the Master found, that the executor of the testator admitted before him, that, although the accounts of the testator's personal estate had not been taken, it had been sufficiently ascertained, from the accounts already rendered, that such personal estate would not be sufficient to pay all the legacies, and, therefore, there would be no surplus out of which a fund could be provided to pay the fine, fees, and expenses then payable in respect of the leasehold property, or upon any future renewal thereof, in case such future renewal should be approved, and effected under the sanction of the Court. And the Master stated his opinion to be, that it would not be for the benefit of the persons interested in the leasehold premises under the will, that the lease lately granted, and yet remaining in the hands of the secretary of the Bishop of Worcester, should be renewed; and that, having regard to the terms of the testator's will, and other circumstances thereinbefore stated, the fine, fees, and expenses payable in respect of such new lease so granted by the Bishop, together with the interest to become due thereon, should be raised by sale of the leasehold premises; the plaintiffs and the defendant the executor being both ready to advance the funds necessary for paying the fine, fees, and interest on taking up the said lease, upon having the amount so advanced repaid to the party making the advance, \*with interest at 51. per cent. per annum, out of the produce of the sale of the said leasehold premises.

[ \*580 ]

This report was confirmed, and, by an order dated the 12th July, 1844, it was ordered that Richard Williams should be at liberty to advance the amount necessary for taking up the lease in the hands of the Bishop's secretary, on behalf of the parties interested therein; and that a sale should be made of the entire property comprised in the lease.

William Hammond being reported the purchaser, his purchase was confirmed absolutely on 3rd December, 1844, and he paid his purchase-money into Court, to the credit of the cause.

The purchaser now moved that he might be discharged from his purchase, and that the sum of 1,493l. 5s. 3d. purchase-money and interest thereon, paid by him into Court, might be paid out to him.

Mr. Shapter, for the motion, contended, that, unless the order Garmstone for sale could be sustained on the ground that the trusts for renewal authorized a sale, the order was improper; for the Court could not direct a sale of the estate of infants on the mere ground that the sale would be beneficial to the infants: Calvert v. Godfrey (1), Peto v. Gardner (2), Stone v. Theed (3). The case of Reeves v. Creswick (4), when attentively considered, was not at variance with this general rule. Here, the trusts for renewal did not authorize a sale.

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## Mr. Terrell, contrà, for the plaintiffs:

The general proposition, that the Court will not direct a sale of an infant's estate, is not disputed: but here no benefit can be obtained for the parties interested except by a sale. Neither a mortgage nor an accumulation of rents and profits will \*have that effect. In Calvert v. Godfrey the benefit of the infant was made the sole ground of application for a sale, and it was held that the Court had no jurisdiction to order it. Here, the testator has himself directed a trust for sale. The trustees are to keep the premises in repair and full lived, and to pay the expenses of renewals and repairs "out of the rents and profits." These words authorize a mortgage or sale: Allan v. Backhouse (5).

[ \*581 ]

(THE VICE-CHANCELLOR: In that case, the plaintiff was not only interested under the will, but stood in the position of a person who had renewed and had a lien.)

Suppose the Court has directed a sale of more property than is required for the purposes of the will, yet, where a part has been raised, the purchaser has not been allowed to inquire whether the Court has exercised its jurisdiction properly.

Mr. Temple appeared for a party interested under the will, and also for Richard Williams.

Mr. Kenyon Parker, for the defendant the trustee.

Mr. Shapter, in reply, referred to Wilson v. Halliley (6), Ryder v. Bickerton (7), Heneage v. Lord Andover (8).

- (1) 63 R. R. 24 (6 Beav. 97).
- (2) 60 R. R. 165 (2 Y. & C. C. C. 312).
  - (3) 2 Br. C. C. 243.
  - (4) 51 R. R. 439 (3 Y. & C. Ex. Eq.
- 715).
  - (5) 13 R. R. 23 (2 V. & B. 65).
  - (6) 32 R. R. 286 (1 Russ. & My. 590).
  - (7) 32 R. R. 277 (3 Swanst. 80, n.).
  - (8) 3 Y. & J. 360. See 24 R. R. 705,

#### GARMSTONE THE VICE-CHANCELLOR:

T. Gaunt.

「 \*582 ]

Considering what was done in Allan v. Backhouse, and the principles applicable to such a case, if Mr. Williams will apply to the Court in this cause by motion, stating that he made the advance, and that he desires to be repaid, it may, upon that motion, and upon the present motion, be referred to the Master to inquire whether it will be for the benefit of all parties that a sale should take place; and if the Master shall report in the affirmative, I think a title may be made. But, circumstanced \*as the title now is, it is too doubtful to force upon the purchaser.

In Allan v. Backhouse, the only reference, as I understand it, was this: to inquire as to the expediency of raising the money by sale or mortgage. The learned and careful Judge who heard the cause did not, I apprehend, think of directing a sale of more than part of the property. There the trustee, having refused to advance the money, the tenant for life advanced it out of his own property, and so obtained a lien—a circumstance upon which, I observe, Sir Samuel Romilly relied in his argument.

After some discussion, it was arranged that an order, suggested by the Vice-Chancellor, and of which the following are the minutes, should be adopted:

Recite the purchaser's motion. Recite, that Robert Williams, informing the Court, that, since the order of the 12th July, 1844, he had advanced the amount necessary for taking up the lease in the hands of (the Bishop's secretary) on behalf of the parties interested therein; and that the amount so paid was the sum of £---; and that he was desirous that the same should be raised by sale or mortgage of the leasehold property in the pleadings mentioned, moved that the same might be sold, or otherwise made applicable for the payment of his demand. He submitting to the jurisdiction of the Court in all respects, and the said (parties to the cause) not opposing the said motion, and the said W. Hammond (the purchaser) not objecting to the title, except so far as it is affected by the said order of the 12th July, 1844, refer it to the Master (upon both motions) to inquire whether R. Williams paid the said sum of £---, and when, and whether the same was a proper payment. And if the Master shall find it was so paid, and was properly so paid, let the Master inquire whether, having regard to that circumstance, and to the rights of all parties interested, it would be for the benefit

of the persons interested, and to be interested, under the testator's will, that the sale made to the said W. Hammond be confirmed and carried into execution. Liberty to state any circumstances specially, &c.

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The Master reported in favour of the confirmation of the sale, and the sale was accordingly effected.

### BOND v. WARDEN (1).

(1 Coll. C. C. 583-589; S. C. 14 L. J. Ch. 154; 9 Jur. 198.)

1845. Jan. 19.

A cheque for 4,374l., drawn upon the Lutterworth Bank, was given to A., at Lutterworth, on the 20th April, after banking hours, in payment for an estate. A., who lived three miles from Lutterworth, immediately handed the cheque to B., to be placed to A.'s account at the Rugby Bank. Rugby is six miles from Lutterworth. On the arrival of the cheque the same day at Rugby, the Rugby Bank had closed; but the cheque was deposited with one of the partners of the Bank for the night, and in the morning of the 21st April it was paid into the Bank, and on the same day transmitted by post to the Lutterworth bankers, with directions to send the amount to London. The Lutterworth bankers received the cheque early on the 22nd. At half-past one o'clock on that day they stopped payment: Held, that the deposit of the cheque with the Rugby bankers was a reasonable and probable course on the part of A.; consequently, that the presentment to the Lutterworth Bank was in time to prevent the cheque from becoming his cheque, and that the debt was still due to him.

Knight Bruce, V.-C.

In October, 1841, a contract was entered into between the plaintiff Bond and Richard Wallin, for the sale to the latter of a farm in Warwickshire, for the sum of 4,200l. Wallin, having entered into possession, by his will devised the farm to the defendants Warden and Smith, upon certain trusts, and died in March, 1842, without having paid the purchase-money.

On the afternoon of the 20th of April, 1843, the plaintiff and his solicitor, and some other parties interested in the estate, met the trustees under Wallin's will at Lutterworth, to complete the purchase, whereupon the plaintiff executed the deeds of conveyance to the trustees, and signed a receipt for the sum of 4,374l., the amount of the purchase-money and interest, and at the same time took from the defendant Smith a cheque for that amount, drawn on the Bank of Messrs. Clarke, Mitchell, Phillips, and Smith, at Lutterworth.

The cheque was in this form: "20th April, 1843. Messrs. Clarke, Mitchell, Phillips, and Smith, bankers, Lutterworth, pay John Bond, Esq., or bearer, four thousand three hundred and seventy-four pounds. For executors of R. Wallin,—Joseph Warden, Thomas

<sup>(1)</sup> Bills of Exchange Act, 1882, s. 74.

Bond v. Warden. SMITH. 4,3741." Across the face of the instrument were written the words "Accepted for Clarke, Mitchell, & Co., J. Meldrun." The instrument was not stamped.

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This cheque was delivered by Smith to the plaintiff at half-past five o'clock on the 20th of April, the Lutterworth \*Bank having The plaintiff, who lived about three miles from closed at four. Lutterworth, then handed the cheque to a Mr. Waters, who was present at the meeting, and who was about to go to Rugby, with directions to deposit it, on his, the plaintiff's, account, in the National Provincial Bank at that place. Waters accordingly, accompanied by the plaintiff's son, took the cheque to Rugby, which is about six miles distant from Lutterworth, and at seven in the evening delivered it to Mr. Sale, the manager of the Rugby Bank. That Bank having closed for the day, Sale, who resided there, deposited it in a place of safe custody for the night. On the following day, the 21st of April, having ascertained the course of the post to Lutterworth, he sent it by post to the Lutterworth bankers, with directions to them to pay the amount to the London and Westminster The Lutterworth bankers received the cheque early in the morning of the 22nd of April. At half-past one o'clock of the same day they stopped payment, and the cheque was consequently returned dishonoured.

The plaintiff filed his bill against the trustees and devisees under Wallin's will, praying for the specific performance of the agreement to purchase the property in question, for the payment of the purchase-money, and for a declaration that he was entitled to a lien on the property for the amount of the purchase-money and interest.

At the hearing, two points were relied on for the plaintiff: first, that the cheque, not being stamped, and not (as the plaintiff contended) showing upon the face of it the place of issue, was invalid; and, secondly, supposing it to be valid, that the plaintiff had taken the earliest and best means to present it for payment, and had not, by laches in that respect, made the cheque his own.

[It is unnecessary to retain here that part of the report which deals with the first point.]

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Upon the point of laches, the evidence of John Meldrun, who had also been a clerk in the same banking-house, was read for the defendants. He stated, that, during all the banking hours of the 21st April, and up to one o'clock on the 22nd April, all cheques drawn upon Clarke, Mitchell & Co. were duly paid.

Mr. Wigram and Mr. Freeling, for the plaintiff. \* \*

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Mr. Russell and Mr. Speed, for the defendants:

Where a cheque is not received at the place where it is made payable, the party receiving it may wait until the following day's post, in order to transmit it for payment: but where the cheque is received at the same place at which it is made payable, (as was the case here), it must be presented for payment on the following day: Boddington v. Schlencker (1). \* \* It is in evidence, that, if the cheque had been regularly presented at any time before one o'clock on the 22nd, it would have been paid. The plaintiff was bound to present it before the expiration of that time: Camidge v. Allenby (2). \* \*

THE VICE-CHANGELLOR [after expressing his opinion that the cheque was void for want of a stamp, said]:

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But, supposing the cheque not void, a question arises whether reasonable diligence was used in presenting it. It was delivered in the town where it was drawn, and where it was made payable, but after the banking-house upon which it was drawn had closed, and after it had become impossible to receive the money on that day. What was it incumbent on the person who received this cheque to do? He was a country gentleman, or farmer, living two or three miles out of the town. There were bankers at Rugby, some eight miles distant, whom (whether he had employed them previously or not) he chose to employ for that purpose. He sends the cheque to Rugby that evening; \*it is received by one of the partners, who deposits it in his house for safe custody for the night; and in the morning it is received into the Bank among the assets of the Bank in the ordinary way. Was this a reasonable proceeding on the part of the plaintiff? I think that he was entitled to employ a banker for the purpose for which he did; that he was not bound to incur the inconvenience of carrying the cheque to his own house in the country, where it might be exposed to various hazards to which it might not be exposed at a banker's. If he had sent it to a great distance, the case might be different; but the Bank at Rugby was not at an unreasonable distance, and I think that the plaintiff, in sending it there, took a reasonable course—a course which the party who delivered the cheque was bound to suppose not improbable. The banker, having received

[ \*588 ]

<sup>(1) 38</sup> R. R. 360 (4 B. & Ad. 752). (2) 30 R. R. 358 (6 B. & C. 373, 382).

Bond t. Warden. it, would have a reasonable time for presenting it, according to the distance of his residence and the custom of business. He inquires in the morning as to the best mode of sending it to Lutterworth, and finds the best to be by post. He puts it in the post-office, and sends it to the bankers themselves upon whom it is drawn, with directions to transmit the money to London.

This mode of presentation is not unusual amongst country

bankers. What might have been the effect as between the plaintiff and the parties who delivered the cheque to him if the Lutterworth bankers had kept their shop open the whole of the 22nd April, and not performed the commission given to them to transmit the money to London, I do not say: that might have placed the plaintiff in considerable difficulty. The actual state of things, however, is this—that, before two o'clock on that day, the ordinary banking hours extending to four o'clock, the Bank stops, and circulars are sent to announce that fact. I am of opinion that the Rugby bankers had the whole of that day for the purpose of presenting the cheque, and that they had it not only for their \*own, but the plaintiff's protection. I think, that, under the circumstances, the mode of presentation was reasonable, and that the Rugby bankers acted with due diligence. I must hold that the plaintiff's debt is due.

[ \*589 ]

1844. Dec. 13, 16. 1845. Jan. 13, 23.

KNIGHT BRUCE, V.-C.

[ 589 ]

# BURY v. ALLEN (1).

(1 Coll. C. C. 589-608.)

A. agrees to take B. into partnership with him for fourteen years, in consideration of a premium of 2,500%, one half of which is to be paid at the signing of the articles, and the other half at the time of the execution of a deed of partnership to be founded on the articles. The articles are signed, the first instalment of the premium is paid, and the parties enter into partnership. After the lapse of a few months, A., under considerable provocation from B., excludes B. from the partnership. The connexion is not renewed, the deed is not executed, nor is the second instalment paid; but there is a formal dissolution of the partnership on a certain day. A. afterwards becomes bankrupt: Held, that, in the accounts to be taken between A.'s assignees and B., the latter is to be credited with the whole amount of premium, but to be debited with the unpaid instalment, and with an additional portion of premium, calculated with reference to the actual duration of the partnership.

Dr. Allen, who conducted an establishment at High Beech, in the county of Essex, for the cure and treatment of insane persons, agreed, in February, 1842, to take the plaintiff George Bury into

(1) Wilson v. Johnstone (1873) L. R. 104, 8 R. 61, 69 L. T. 786; and see 16 Eq. 606, 42 L. J. Ch. 668; Belfield Partnership Act, 1890, s. 40. v. Bourne [1894] 1 Ch. 521, 63 L. J. Ch.

partnership with him. Accordingly, certain articles of partnership, headed "Instructions for Articles," dated the 15th February, 1842, were drawn out, and subsequently signed by the parties. These articles contained, amongst others, the following provisions:

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That the partnership should commence as from the day \*of the date thereof for fourteen years: that the plaintiff should pay to Dr. Allen a premium of 2,500l., for an equal moiety or share in the business, one half of such premium to be paid in cash, on the signing of those minutes, and the remaining half within two months from the day of the commencement of the partnership: that a valuation should forthwith be made by two competent persons, and, in case of difference between them, by an umpire, of all and singular the household furniture and effects then in use in and about the premises of the establishment, and also of all the horses, carriages, carts, cows, oxen, sheep, growing crops, stores, live and dead stock, and all other the effects then belonging to Dr. Allen, and used by him in carrying on the establishment, with certain specified exceptions: that so much of the said valuation as should consist of household stores, wines, spirits, provisions, and the like stock, should be considered as so much money brought in by Dr. Allen, and the moiety thereof be paid or accounted for by the plaintiff to Dr. Allen by equal instalments at three months and six months from the date of those articles: that the plaintiff should pay to Dr. Allen one moiety of such valuation, exclusive of stores as aforesaid, by equal instalments at six, twelve, eighteen, twenty-four, thirty, and thirtysix months from the 25th day of March, 1842, with interest at the rate of 5l. per cent. per annum from the said 25th day of March: that a fair annual rent, to be fixed by arbitration, should be paid by the co-partnership to Dr. Allen for the use of the premises: that the capital should consist of the stock in trade comprised in the said valuation, and of the sum of 500l. in cash, such cash to be brought in by each of the said parties, in equal shares, on the 25th day of March then next: that Dr. Allen should pay and clear up all outgoings of every kind up to the 25th of March, the plaintiff allowing, at the first settlement, one half-quarter of all rates, taxes, salaries, and wages; after which all outgoings, \*and the rent, to be fixed as aforesaid, should be paid out of the co-partnership funds: that proper books of account should be kept, &c.: that a banker's account should be opened, and that all monies received should be paid into the Bank, and no payments of 51. or upwards should be made but by cheques on such bankers: that the plaintiff should

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BURY r. Allen. reside constantly on the establishment, and should devote the whole of his time and energies to the promotion and benefit thereof, and in consideration thereof he should live rent-free, and be allowed board and lodging and washing for himself, family, and servants: that, for the first twelve months of the co-partnership, Dr. Allen should continue to reside in his then residence in the establishment rent-free, and be allowed board, lodging, and washing for himself and servants: that the accounts should be balanced quarterly, and each party should thereupon be at liberty to draw out his share of the profits actually received and lying at the banker's over and above 500l. cash in hand, to be reserved: that the articles should contain the usual clause of reference of all disputes and differences to arbitrators, and such other formal and usual clauses, for carrying the intention of the parties into effect, as the solicitors for the respective parties, or, in case they should differ, as some counsel, to be nominated by them, should consider necessary and proper.

Under these articles the plaintiff and Dr. Allen entered into partnership on the 15th February, 1842; and some time between that time and April, the plaintiff paid to Dr. Allen the sum of 1,250l., being one moiety of the premium agreed to be given by him for his admission into the partnership.

In April, 1842, the draft deed of partnership was prepared. It was considered, that, by the last clause in the articles, it was competent to the parties to vary the details of their agreement. It was accordingly (in pursuance of the advice of counsel acting for both parties) expressed in the draft, that the valuations, which by the articles were to \*be made at a future time, had been already made, and that their amount had been fixed at  $\pm$ —. It was also expressed that the remaining instalment of 1,250l. would be paid, not on the day mentioned in the articles, which had gone by, but "on the day of the date of these presents."

The arbitrators having differed as to the valuation of the property and of the rent, the execution of the deed of partnership was delayed, and the remaining instalment of 1,250l. was not paid. In the meantime disputes arose between the partners themselves, the plaintiff complaining that Dr. Allen had received sums of money to a large amount, which he had not paid to the bankers of the concern; Dr. Allen, on the other hand, admitting this, but stating that all the monies so received had been applied to the purposes of the establishment, and that this had been unavoidable, by reason of the plaintiff's delay in paying the further instalment of 1,250l.

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In relation to this subject, Dr. Allen wrote the following letter to the plaintiff:

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"July 26th, 1842.

"My draft Sir,—There certainly are several accounts recently received which I have not paid into the bankers, and it is with extreme regret I found myself obliged to adopt such a course. You were, however, perfectly aware that I was in want of money, and the cause; and if you had paid me the sum agreed at the time I had a right to calculate upon, there would have been no necessity for my doing so. You may rest assured that all is going on well with me, and as soon as you pay over what is due to me, every thing

"I am, my dear Sir,
"Yours faithfully,
"MATTHEW ALLEN.

"To GEORGE BURY, Esq., High Beech."

will be done on my behalf to your satisfaction.

Other disputes had also arisen, prior to the date of this letter, of this nature: Dr. Allen complained that the \*plaintiff and his family did not, according to the terms of the agreement and express understanding of the parties, reside in the establishment, but nevertheless received from it the advantage of stores, provisions, &c. plaintiff, on the other hand, complained of want of proper accommodation, and of the temper, and, as he alleged, somewhat coarse habits, of Mrs. Allen in regard to drinking, &c. Allusion is made to this last matter of complaint (which, however, was not satisfactorily proved) in the following entry, which was made by the plaintiff in a sort of journal kept at the establishment: "Saturday, 30th July, 1842. Dr. Allen went to town in the morning.—Mr. L- and Mr. B-, each with an attendant, was taken out for a walk.-Letter from Mr. Noble giving the award of Mr. Gadsden. . . . Mr. L- and Mr. S- took supper with me; and after supper, the servants wanting me down stairs, I went into the hall, whence I was called by Mrs. Allen, who said Dr. Allen wanted me. When we entered the parlour, Dr. Allen sat down, and in the most intemperate manner began to rebuke me for what I had told Mr. Solly and Mr. Bischoff with respect to Mrs. Allen, on the authority of Mr. Stockdale, Dr. Allen's own nephew, and upper servant for many years; Mr. Joseph Nelson, his late clerk, and others in the establishment, having named to the gentlemen before mentioned the source whence my information was derived; and I believe that I also stated to them my suspicion, that, from what I

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had myself witnessed on two separate occasions, there was some foundation for the information in question. I at once gave up that authority to Dr. Allen, as I had done to Mrs. Allen in a conversation I had with her on the morning. After a pretty sharp volley of fiery words and a tenfold more fiery manner from Dr. Allen, he exclaimed, that, if he was a man of the world, he would shoot me, with direful loud voice and fierce gesture. To my cool reply of 'Try it, old man,' he responded by raising up on high a great bludgeon that \*he had brought with him with the intention of striking me, and perhaps killing me in a less polite way than shooting me. Mrs. Allen came to the rescue most fortunately, and thus my poor body was preserved whole, intact, and unmaimed. After the extreme violence of the fracas, Mrs. Allen began to vaunt about her great exploits and character, upon which I told her that her character was well known."

In consequence of this entry, Dr. Allen excluded the plaintiff from the establishment in the manner which afterwards appears, whereupon the plaintiff, on the 17th August, 1842, filed his bill against Dr. Allen, praying the dissolution of the partnership, the return of the premium, and for an account of the partnership dealings and transactions, an injunction, and receiver.

Dr. Allen, by his first answer to the bill, after setting out the above-mentioned entry, stated, that, after reading it (which he did on the 1st August, 1842, after his return from London), he took possession of the journal or book in which it was written; and he admitted, that, upon the plaintiff sending for it the same evening, he the defendant refused to give it up. He then stated, that on the following morning the plaintiff again demanded the journal, and threatened to send for a policeman and have him the defendant taken up for felony, if he should refuse to deliver it, which he the defendant, however, refused to do, and the plaintiff thereupon actually went and brought a policeman with him to the establishment; but the defendant feeling he ought not, and could not, any longer submit to such conduct on the part of the plaintiff, and that he owed it as well to the inmates as to himself to exclude the plaintiff from any further interference in the establishment, ordered the servants to fasten the doors against him, and refuse him admittance. which upon his return with a policeman was accordingly done.

In a subsequent part of the answer the defendant "admits, that, for the reasons and under the circumstances herein appearing, and inasmuch as the said establishment is \*the sole and absolute property of defendant, he the defendant does persist in refusing to admit the

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said plaintiff to enter on the premises where the said establishment is carried on, or to see the patients, or to take any active part in the affairs and business of the said establishment, and that the defendant hath, for the reasons and under the circumstances aforesaid. given orders to the servants of the said establishment to shut the doors of the said establishment against the said plaintiff whenever he might apply for admittance thereto. Believes that the said plaintiff has applied for and been refused admission to the said establishment, and that the doors thereof have been, and the same were, for the reasons and under the circumstances aforesaid, on the 9th of August, 1842, locked, and the same were afterwards for a time kept locked, against the said plaintiff. Believes that the servants of the said establishment have stated, as the fact was, that, in shutting the doors and excluding the plaintiff from the said establishment, they acted under the orders of this defendant, which he submits he was fully justified in giving."

BURY ALLEN.

After the filing of this answer, and of an answer to the bill as amended, the plaintiff and defendant, in July, 1843, joined in publishing in the Gazette a notice of dissolution of the partnership as from the 1st of that month. And in December, 1843, after such further proceedings had in the cause as are more particularly referred to in the judgment in this case, Dr. Allen became bankrupt, whereupon a supplemental bill was filed against his assignees, praying the benefit of the original suit and proceedings against them, and that, in the decree to be made in the suits, regard might be had (if necessary) to the notice of dissolution, and the change in the rights of the parties thereby.

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Upon the merits of the cause, [the only question requiring a report was as to the plaintiff's right to recover the premium, or a part of the premium, which he had paid for his admission into the partnership. Upon that point]

Mr. Simpkinson and Mr. Heathfield, for the plaintiff, [cited Newton v. Rowse (1), Therman v. Abell (2), Tattersall v. Groote (3), Hamil v. Stokes (4), Ex parte Sandby (5)].

Mr. Swanston and Mr. Daniel, for the defendants:

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\* \* Admitting that the plaintiff might have had some claim against

(1) 1 Vern. 460.

for a full statement of that case.

(2) 2 Vern. 64.

(4) 18 R. R. 690 (Daniel, 20; 4

(3) 2 Bos, & P. 131, 135. See 14

(5) 1 Atk. 149.

Price, 161).

R. R. Pref. viii., and [1894] 1 Ch. 525

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Dr. Allen in respect of the premium, had bankruptcy not intervened, it is impossible, under existing circumstances, that the Court should give effect to his claim. The demand consists, not of any alleged debt, but of unliquidated damages (1). \* \* In Ex parte Broome (2), which was a case of fraud, a partner was allowed to enter a claim in respect of the whole premium against his co-partner; but it appears that he was not allowed to prove with the separate creditors. Upon the whole, it is submitted, not only that the plaintiff has no right of proof under the bankruptcy, but that, even before the bankruptcy, he had no right to insist, as against Allen, that the premium, or any part of it, should form an item in the account. The prayer of the bill is inconsistent in asking a return of the premium, and that the partnership accounts may be taken. premium is a matter antecedent to the partnership, and not a matter involved in the partnership account, and the return of it is properly enforceable by action: Rawson v. Samuel (3), Venning v. Leckie (4), Gale v. Leckie (5).

Mr. Simpkinson, in reply.

In the course of the argument, the Vice-Chancellor sent for the Order Book in Bankruptcy, which contains the statement of the proceedings in Ex parte Broome. His Honour, after perusing the order as there set out, said, that he could find nothing in it which corresponded with, or was analogous to, the words "but not to prove with the separate creditors," contained in the judgment as stated in the report (6).

- (1) Under the law of bankruptcy then in force unliquidated demands were not provable.—O. A. S.
  - (2) 1 Rose, 71.
  - (3) 54 R. R. 259 (Cr. & Ph. 161).
  - (4) 12 R. R. 292 (13 East, 7).
  - (5) 19 R. R. 692 (2 Stark. 107).
- (6) Order Book, 1810, No. 124, pp. 151, 152. "I do further order, that the said R. Broome be at liberty to go before the said commissioners and prove such debt under the said commission as he shall be able to substantiate, and be admitted a creditor for what he shall be able to prove, and be paid a dividend or dividends, in respect thereof, rateably and in equal proportions with the rest of the creditors of the said bankrupt seeking

relief under the said commission, but so as not to disturb any dividend or dividends already made under the said commission; but if the said R. Broome shall not be able to make a proof under the said commission, let him be at liberty to make and enter a claim under the said commission. And I do order, that the costs of both parties be reserved until after the choice of assignees before directed, and also until after the said R. Broome shall have gone before the said commissioners to make a proof or a claim under the said commission; when any of the parties are to be at liberty to apply to me in relation to the matters in question as they shall be advised."

THE VICE-CHANCELLOR [after stating the object of the bill and the proceedings in the suit, said]:

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A decree under these circumstances for taking the partnership accounts is of course; and in effect but two matters have been argued—the only two indeed, upon which, at the present stage of the cause, any difference has or reasonably could have arisen. The first was as to Dr. Allen's costs since the service upon him by the plaintiff of a \*subpæna to hear judgment, so far as they were occasioned by that subpæna; the second as to a sum of 2,500l., to which I shall presently advert.

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With regard to the first, I think that Dr. Allen, after the choice of assignees, and after the supplemental bill filed against them had been answered, having been served with a subpæna to hear judgment, was justified in attending to it and appearing at the hearing. I need not, however, nor perhaps ought, to give an opinion as to his title to costs, subsequent to that service; for I am informed, and I suppose correctly, that Dr. Allen's death has happened since the commencement, but before the conclusion, of the argument, and that there has not been, nor is intended to be, any revivor in consequence.

With regard to the 2,500l., the matter stands thus: the establishment and business were originally those of Dr. Allen alone. Desirous of having a partner, he treated on the subject with the plaintiff, and the treaty produced an agreement which was the basis of the partnership already mentioned. The terms of the agreement were committed to writing, and the writing was signed by them before July, 1842. It bears the date of 15th February in that year, and the parts of it material for the present purpose are these: (His Honour here read the material parts of the agreement. See ante, p. 201.) Any more formal or farther instrument has never been executed or signed. The valuations that were to be made were, if not completed, very nearly completed before the end of July, 1842. A moiety of the 2,500l. was paid by the plaintiff to Dr. Allen before the commencement of that month. The other moiety has never been paid, though some other payments have been made to him or to the partnership, or to both, by the plaintiff. They inserted, in July, 1843, as I have said, an advertisement in the Gazette of the dissolution of their partnership. This was done by arrangement, and without prejudice to the question whether it had been earlier dissolved. The parties, by their \*counsel, on a day in December last, during the hearing of the cause, agreed that

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BURY v. Allen. the dissolution should be considered and treated as having taken place upon and from the 1st of July, 1843, but not sooner. This last agreement I view as meant to regulate the ordinary accounts merely, without prejudicing or affecting any question as to the 2,500l. The assignees assert, and the plaintiff denies, that the unpaid moiety of this sum ought to be paid by him to them. He asserts, and they deny, that a proportion of the other moiety of it should be returned to him, that is, should be credited to him in taking the accounts; and they say, that, if the plaintiff had ever any claim in this respect, it was only against the bankrupt personally; to which the bankrupt objected, and the plaintiff does not assent.

These conflicting claims render it necessary, I think, to consider the origin and circumstances of the separation between the partners—of the exclusion of one by the other.

It appears that the plaintiff kept at the establishment a book which may or may not have been strictly a partnership book, but in which he made entries from time to time relating to the patients, and to transactions concerning the partnership business, and which certainly was open to Dr. Allen's inspection. In this book, the plaintiff, on Saturday, the 30th, or Sunday, the 31st of July, 1842, made the following entry, to which I have already referred: (His Honour here read the entry. See ante, p. 203.)

It is admitted that the altercation, stated in this entry to have

taken place on the 30th of July, 1842, did take place. however, no other evidence of it, so far as I am aware. The entry. which was first seen by Dr. Allen on the 1s August, 1842, is in evidence. Now, as the dispute is there described, it was commenced by Dr. Allen, not by the plaintiff, against whom Dr. Allen and Mrs. Allen may or may not have had cause of complaint and remon-That is a different question. The \*quarrel, having thus strance. begun, proceeded intemperately on the part of Dr. Allen certainly,perhaps on the part of the plaintiff also. I have not, however, been able, from the materials before me, to gather sufficient reasons to justify Dr. Allen in the exclusion to which he resorted—in the course which he took; considering, especially, what by the entry the plaintiff is represented as having said, and some portions of the oral testimony. That the plaintiff had acted indiscreetly before the dispute, I believe, or think probable; that he did not conduct himself discreetly during the dispute, is also to be inferred; and

that the entry itself, its terms, and the manner of it, are to be

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regretted and disapproved, it is impossible to doubt. But it does not strike me that he alone was in error; and, it being remembered that Dr. Allen had received from the plaintiff, on account of the 2,500l. for admission into the partnership, so large a sum as 1,250l., I cannot, upon the whole, I repeat, think, that the mode of proceeding adopted and pursued by Dr. Allen, considered, at least, as the conduct of a man not abandoning his claim to the 1,250l. unpaid, and to part of the 1,250l. paid, was justifiable. It is said, that, independently of the entry, the quarrel set down in it, and the matter or alleged matter which was the assigned cause of that quarrel, there had been causes of complaint against the plaintiff. If there were any such, they appear to me to have not been weighty; to have never been treated or considered by Dr. Allen before the quarrel of the 80th of July as grounds for determining the connexion between them; and to have been (if there was anything to waive or forgive) waived or forgiven before the quarrel. This is shown by Dr. Allen's letter of 26th July, 1842, as well as other-Substantially, from the 1st or 2nd of August, 1842, the exclusion of the plaintiff by Dr. Allen was complete. Substantially, from one of those two days, Dr. Allen re-possessed himself of the concern. His first answer contains these passages: (His Honour here read \*certain passages from the answer, which have been, in substance, stated. See ante, p. 204.)

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On the whole, I think, that, had Dr. Allen not become a bankrupt, he would, under the particular circumstances of the case, have been precluded from demanding any farther portion of the 2,500l., and compelled by this Court to refund, that is, to be debited in the accounts with a proportion of the 1,250l. paid. Does the bankruptcy make any difference as to the accounts? that is, can the assignees reject that debit and claim credit for the unpaid 1,250l.?

As to the latter, their rights cannot of course stand higher than those of Dr. Allen. As to the former, I have attended to what has been said in argument on the subject of cases of unliquidated damages, and to the authorities that have been cited. Whether there is any sense in which, or purpose for which, the plaintiff's demand in respect of the paid 1,250l., under the circumstances belonging to it, could be termed properly a demand for unliquidated damages, I do not think it necessary to express an opinion. I may, however, observe, that, though the notion of unliquidated damages is generally connected with the notion of an action at law, and

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though I do not say whether, in my judgment, at any time between the 29th of July, 1842, and the bankruptcy, any action could or could not have been brought successfully by the plaintiff against Dr. Allen, it is, I apprehend, plain, that one of two partners may have a demand against the other for compensation, substantially in the nature of unliquidated damages, enforceable in equity, and in equity only. Suppose the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership: whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect. Suppose the partnership dissolved; that matter must form, I conceive, \*an item in the accounts to be taken. Suppose his bankruptcy, preceded or not preceded by a dissolution. the accounts, however, not taken: suppose the amount or extent of loss or damage, occasioned by the conduct assumed to have taken place, not at the time of the bankruptcy to have been compensated or ascertained, or become capable of ascertainment, but afterwards to have become capable of ascertainment and been

ascertained—is it to be struck out of the accounts between the

assignees and the other partner?

In the present case, there are accounts, partnership accounts, in any event necessarily to be taken; accounts involving mutual demands. The demand now under consideration was, as well as the accounts generally, the subject of the present suit before the The suit was at issue before the bankruptcy. bankruptcy. disputed item of debit was or would have been a proper item in the accounts between Dr. Allen and the plaintiff, independently of the bankruptcy-if, independently of the bankruptcy, Dr. Allen could not have claimed anything from the plaintiff in respect of the matters in question without satisfying his demand in respect of the 1,250l. paid, as I think Dr. Allen could not,—can the accounts now with justice or propriety be taken without this item? Is the 50th section of the stat. 6 Geo. IV. to be disregarded? Why should this matter not be considered to be within it? The analogy suggested between the present case and those where a return of premium or relief upon that footing is sought, by reason of a partnership having been terminated by a bankruptcy,—the partnership having subsisted without disturbance down to the bankruptcy,-does not, in my judgment, exist, or at least is very far from perfect. But I give no opinion how the matter would have stood had there been no

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exclusion, no separation, no dispute before Dr. Allen's bankruptcy, or had the exclusion, the separation, and the dissolution taken place before the bankruptcy \*under circumstances materially different from those which appear to have existed in fact.

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As the case actually stands-considering that, whether the plaintiff was or was not free from blame, the exclusion of him, and the resumption of the sole possession and dominion of the business and establishment by Dr. Allen were, I think, complete, and in effect final, and, circumstanced as they were, unjustifiableconsidering, I repeat, that, from the time of the exclusion, that is, from the 1st or 2nd of August, 1842, Dr. Allen continued to prevent the plaintiff from using or exercising the rights of a partner—considering the dissolution which followed, and must be treated as connected with that exclusion, and must be referred to it-considering that all this was before the bankruptcy—that the original suit, and particularly Dr. Allen's first answer, were such as they were, and that the cause had reached before the bankruptcy the stage which it did reach before the bankruptcy,—the Court is, I think, bound to declare, that, in the accounts to be taken between the assignees and the plaintiff, he is to be credited with the 2,500l. mentioned in the agreement, but debited, on the other hand, with the 1,250l. unpaid; and besides, with such a sum as bears the same proportion to the whole 2,500l., as the time from the commencement of the partnership to the 1st of July, 1843, inclusive, bears to the whole term of fourteen years mentioned in the agreement. I think the measure of time in this case the only practicable and the proper measure, though I have not failed to consider the remarks on that view of the case which have been made by the assignees' counsel. Nor have I omitted to observe the power of dissolving at the end of seven years contained in the agreement: that, from its nature and terms, makes, I conceive, no difference.

Any question of interest must, as well as all costs between the plaintiff and the assignees, be reserved. I do not know whether any joint creditors of Allen and Bury \*have proved under the fiat. But, as probably all the joint creditors have been or will be paid in full by the plaintiff, or out of the joint estate, some arrangement should be, if none has been, made, to prevent any dividend from being declared in the bankruptcy prejudicially to the plaintiff's rights, whatever they may be. Some claim, I suppose, has been, or ought to be, entered on the proceedings.

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I have not forgotten, though I have not alluded to, the reliance placed by the assignees' counsel on the case of Rawson v. Samuel, from which the present differs materially in several respects. I apprehend that my decree in this case is not inconsistent with anvthing decided or said in that by either of the experienced Judges before whom successively it was, or with Ex parte Eyre (1), or Akhurst v. Jackson, or Green v. Bicknell. It is, therefore, unnecessary to say, and I wish to be understood as not intimating, whether I do or do not dissent from Green v. Bicknell. case Ex parte Broome, also cited at the Bar, I suppose that there a proof in competition with the joint creditors, if any, or to their prejudice directly or indirectly, must have been considered inadmissible: but I am not satisfied that it was Lord Eldon's meaning, that, if there was to be any proof at all for the purpose of a dividend, the proof could be otherwise than upon an equal footing as to dividends with the proofs of the general body of separate creditors, supposing the rights of the joint creditors out of the question.

Refer it to the Master to take an account of all the partnership dealings and transactions between the plaintiff and the late defendant Matthew Allen, deceased, from the time of the commencement thereof; and of all monies received and paid by the said plaintiff and the said late defendant Matthew Allen, and by the defendants William Pennell and William Charles Wryghte, the assignees of the said late defendant Matthew Allen, since his said bankruptcy, or by any other person or persons by their order, or for their use respectively, in respect of such co-partnership; and declare, that, in taking such accounts, the said plaintiff is to be \*credited with the sum of 2,500l., in respect of the premium agreed to be paid by him for an equal moiety or share in the business of the said co-partnership, and is to be debited with the sum of 1,250l., being the moiety remaining unpaid of such premium, and is also to be debited with the further sum of 245l. 19s. 6d., being the proportionate part of the said sum of 2,500l., for the period of time from the commencement of the said co-partnership to the 1st day of July, 1843, inclusive. And let the plaintiff be at liberty to go in before the commissioner acting in the execution of the fiat against the said late defendant Matthew Allen, and tender a claim for the sum of 2,500l., without prejudice to any question. . . . And

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let the Master be at liberty to state any circumstances specially as to the several sums of 250l., 200l., and 300l., in the pleadings mentioned to have been paid by the plaintiff to the late defendant Matthew Allen, and otherwise.

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## PARKER v. SMITH (1).

(1 Coll. C. C. 608—625.)

1845. Jan. 17, 18.

Although acts done which are preliminary to a contract cannot operate as acts of part performance, yet acts done subsequently to and attributable to a contract (though not obligatory thereunder) may take the contract out of the Statute of Frauds.

KNIGHT BRUCE, V.-C. [ 608 ]

Quære, whether the words "approved by me, J. S.," affixed to certain memoranda by way of approval of an arrangement in which the party is interested, is a signing within the Statute of Frauds.

THE bill stated, that Hugh Parker the elder, being seised in fee simple of a freehold estate at Woodthorpe, containing beds of coal of great extent and value, by an indenture of lease dated the 3rd January, 1839, and made between himself of the one part, and Hugh Parker the younger, John Rhodes, John Parker, and James Rhodes, of the other part, demised and leased to the parties of the second part, their executors, &c., all those two beds, mines, or seams of coal, commonly called the Upper (or Manor) bed of coal, and the Lower (or Sheffield) bed of coal, lying and being under the several closes mentioned in the lease, to hold to the lessees for the term of forty-two years from the 2nd February then last past, yielding and paying the yearly rent of 630l., by two equal half-yearly payments, on the 2nd of August and the 2nd of February in every year, such rent being thus calculated; viz. the sum of 2101., part thereof, as the price or value of one surface acre of the Upper or Manor bed, and the sum of 4201., residue thereof, as the price or value of one surface acre of \*the Lower (or Sheffield) bed; and also yielding and paying on the same days a further rent, after the rate of 210l. per acre for so much coal beyond one acre (if any) of the aforesaid Upper or Manor bed, and a further rent after the rate of 420l. per acre for so much coal beyond one acre (if any) of the aforesaid Lower or Sheffield bed, which the lessees should have worked and gotten during the halfyear for the time being elapsed.

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(1) Disapproved by Lord Selborne, L. C., in *Maddison* v. *Alderson* (1883) 8 App. Ca. at p. 482, 52 L. J. Q. B. 737, 49 L. T. 303, so far as concerned the question of part performance, on the ground that there was no settled contract until after the acts alleged to be attributable thereto had been done.—O. A. S.

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The bill then stated, that, in the spring of 1841, the lessees, who were working the colliery in co-partnership, found that it must be a losing concern to them, unless an alteration were made in the terms of the lease, and that they communicated this to Hugh Parker the elder, who, being fully aware and satisfied of the truth of such statements, verbally agreed to revise the lease, and engaged to give the matter attention, and that he afterwards, acting on the faith of such representations, and being satisfied that the rents were too high, declined receiving from the lessees any part of the half-year's rent, which became due on the 2nd day of August, 1841.

The bill then stated, that, at or about the time during which the negotiation was pending for an alteration of the terms of the lease, John Parker and James Rhodes became desirous of retiring from the partnership, and it was accordingly arranged between them and their co-partners, with the knowledge and sanction of Hugh Parker the elder, that the partnership should be dissolved so far as related to John Parker and James Rhodes. That this arrangement was carried into effect by a deed of dissolution, bearing date the 27th July, 1841; and by such deed the remaining partners, Hugh Parker the younger, and John Rhodes, who were plaintiffs in this suit, jointly and severally, covenanted to indemnify John Parker and James Rhodes against the rents and covenants of the lease.

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The bill then alleged, that the lessees, having previously to such dissolution consulted Hugh Parker the elder as to the terms of the lease, and the said Hugh Parker having \*frequently expressed his willingness and intention to revise and alter the terms of it, the plaintiffs, fully relying on such promise, were induced to take the shares of John Parker and James Rhodes in the said colliery, and to enter into the aforesaid covenants to indemnify.

The bill further alleged, that, after the dissolution, the said colliery was carried on by the plaintiffs, who from time to time pressed the said Hugh Parker the elder on the subject of the lease, as well by themselves as by their solicitors, and that the said Hugh Parker frequently stated he was perfectly satisfied it was right to carry his promise into legal effect; and that, in the month of September, 1842, Jonathan Rhodes, an experienced collier, the father of the plaintiff John Rhodes, at the request of Hugh Parker the elder, gave his opinion as to the value of the coal, by letter addressed to the said Hugh Parker.

The bill then stated the following letters: Plaintiff John Rhodes to Hugh Parker the elder.

"SPRING WOOD COTTAGE, 28th Sept., 1842.

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"Dear Sir,—I hope you will not think me troublesome in calling your attention to a subject connected with the colliery, which has been in agitation some length of time, viz., the new adjustment of coal rent which you had yourself proposed some time ago. It is my father's impression, as well as my own, that now is the time to have that matter settled; and we cannot suggest a better plan, should such meet your approbation, than that Mr. Jeffcock be allowed to report upon it, &c.

"Your obedient servant,
"JOHN RHODES."

Hugh Parker the elder to Mr. Haywood, the plaintiff's solicitor:

"Dear Sir,—I have considered old Mr. Rhodes's letter about the coal rent. Although I fear that there is no doubt that the rent first agreed upon, before the depression of times came on, was too high, still I cannot but \*think old Mr. Rhodes has taken a view founded too much on the present depressed state of things. I am, however, desirous that an equitable arrangement should be made, and I agree to refer the future terms of rent to Mr. Thomas Jeffcock, according to the proposition of Mr. John Rhodes, whose letter to me of the 28th of September I now enclose.

"I remain, dear Sir, very truly yours,
"H. PARKER."

"WOODTHORPE, Oct. 29, 1842."

The bill then stated, that Mr. Haywood, acting on behalf of the plaintiff, consented to the proposal contained in the last-mentioned letter, and shortly after the receipt of it, delivered it, together with the letter of John Rhodes of the 28th September, 1842, to Mr. Jeffcock, with instructions to act upon the same. That Jeffcock, who was an experienced colliery viewer, proceeded to view the colliery, and on the 24th November sent to the plaintiffs and to the said Hugh Parker a report in these terms: "Gentlemen,-Mr. Haywood, solicitor, Sheffield, having placed in my hands letters signed by Hugh Parker, Esq., and Mr. John Rhodes, on behalf of the Woodthorpe Coal Company, appointing me to fix a rental per acre on the coal, &c. I have come to the following decision. Manor seam.—That all the coal to the bassett of the top level or horse gate be after the rate of 125l. per acre, and that the remainder to the deep of the top level be after the rate of 150l. per acre. Sheffield seam.—That this seam of coal be after the rate of 300l.

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[ \*612 ]

[ \*613 ]

per acre. I have now acted up to the power vested in me, &c. However, having had conversation with the parties interested in the present lease, I would, with due deference, suggest an alteration as to the mode of payment as follows: That 300l. be paid as a certain rental per annum for the Manor seam, and if a greater quantity of coal be got above the value of 300l., to be paid after the rate of 125l. or 150l. per acre, as the case may be. That the rental of the Sheffield seam shall \*commence from the day the coal is pricked; and that a certain rental of 600l., or the value of two acres, be paid per annum, and if a greater quantity of coal above the value of 600l. be got, to be paid for after the rate of 300l. per acre."

The bill then stated, that, after Mr. Jeffcock had made his report. and on the 30th day of November, 1842, a memorandum was entered into and duly signed by the plaintiff John Rhodes on behalf of himself and the plaintiff Hugh Parker, jun., and that the same was in these terms, viz.: "A certain annual rental of two acres of Manor bed to be paid, and, after the Sheffield bed is pricked, one acre of each bed. All coal gotten over and above that quantity to be paid for according to Mr. Jeffcock's scale, namely, Sheffield bed 300l., Manor bed, to the rise of present levels 125l., below present level 1501. November 30, 1842. John Rhodes." That, on the same 30th November, the plaintiffs respectively signed the following memorandum, on the same sheet of paper on which the lastmentioned memorandum was written, viz.: "If we do not, within two years from Lady Day, 1843, commence sinking to the deep or Sheffield bed of coal, we will render ourselves liable to pay for an additional acre of the upper bed until we prick the lower bed. John RHODES; HUGH PARKER, jun.;" and that the said Hugh Parker the elder signed both the said memorandums, immediately afterwards. in manner following, that is to say, "approved by me, H. PARKER."

The bill then stated, that, after these memorandums had been duly signed in manner aforesaid, and on the 5th December, 1842, Hugh Parker the elder wrote and sent to said Mr. Jeffcock a letter of that date in these words:

"Dear Sir,—I have had conversation with Mr. Rhodes since you sent in your report, and he has sent me the observations I enclose. He agrees to the terms you have mentioned for the future rents to pay for two acres of the Manor bed; but, after he sinks to the lower bed, he does not like to be bound to pay for two acres of each bed, but \*proposes to pay for one acre of each, but for a greater

quantity if gotten. I do not know that it would be to the disadvantage of the lessor to covenant to have the rents so fixed, because I think it would not answer the purposes of the lessees to go down to the lower bed and get so small a quantity as an acre. Please to consider Mr. Bhodes' observations.

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"I remain yours truly,

"H. PARKER."

"WOODTHORPE, 5th December, 1842."

The bill then alleged, that, shortly after such agreement as aforesaid had been entered into by the plaintiffs and the said H. Parker the elder, a surrender of the said lease of the 3rd January, 1839, was prepared and engrossed, and the draft of a new lease dated 2nd August, 1842, of the said colliery and premises from the said Hugh Parker [the elder] to the plaintiffs was prepared by the solicitors of the plaintiffs and verbally approved by H. Parker [the elder]. That, after the said new lease had been thus approved by all parties interested therein, the draft thereof was engrossed; but that, before the same or the surrender of the former lease was executed, and on or about the 16th January, 1843, a fiat in bankruptcy was issued against the said Hugh Parker [the elder], under which he was declared bankrupt.

The bill then, after stating refusals by the assignees under the bankruptcy to carry into effect and specifically perform the arrangement and agreement so as aforesaid entered into between the plaintiffs and the said H. Parker [the elder] before he became bankrupt, charged that the said new lease to the plaintiffs, and the terms upon which the same should be granted, were definitely settled and agreed upon, and signed by the said Hugh Parker, and in the event of the said Hugh Parker not having become a bankrupt, he would have been bound to carry such arrangement and agreement into effect; and that, on the faith of such arrangement and agreement as aforesaid, and in the confidence that the same would be carried into effect, the plaintiffs have \*continued to work the said colliery on their own account as co-partners, and have expended large sums of money thereon, and are now continuing to work the same as the parties who are solely interested therein. The bill also charged, that, from and after the dissolution of the said partnership, the defendants John Parker and James Rhodes abandoned all benefit under the lease of the 3rd January, 1839; and it was expressly understood and agreed between them and the

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said Hugh Parker [the elder], that from thenceforth the plaintiffs only should be tenants of the said colliery and premises, and that all the interest of the said defendants, John Parker and James Rhodes, should cease and determine, and, as evidence thereof, the plaintiffs charged that the said Hugh Parker [the elder] wrote and sent to the defendant John Parker a letter dated the 14th September, 1841, in these words: "As the colliery cannot sustain, with any profit, so large a number of partners, I have arranged with Mr. Rhodes and Hugh that you and James Rhodes shall retire, and that I will accept them, viz., John Rhodes and Hugh as my tenants, releasing you and James Rhodes. Mr. Smith on your part and Mr. Havwood on the part of the Rhodes's have, I understand, prepared the deed of dissolution of partnership, and I have only to add, that I accept Mr. John Rhodes and Hugh as my tenants, and I release you and James Rhodes from the provisions of the lease; and if any instrument of release be thought necessary by you or him, I am ready, whenever called upon by either of you, to execute it at your or his expense. H. PARKER, Woodthorpe. 14th September, 1841."

The bill prayed that the said agreement and arrangement made and entered into between the said Hugh Parker [the elder] and the plaintiffs, and the defendants John Parker and James Rhodes, might be carried into effect by the decree of this Court, and that the defendants, the assignees, might be ordered to accept a surrender of the lease of the 3rd January, 1839, and to release and indemnify the defendants John Parker and James Rhodes from the \*covenants therein contained; and that the said John Parker and James Rhodes might join (if necessary) in such surrender, and that the defendants the assignees might be ordered to grant a lease to the plaintiffs of the said colliery and premises from the 2nd August, 1842, for the remainder of the said term of forty-two years, and upon such terms as agreed upon between the plaintiffs and the said Hugh Parker [the elder] and for general relief.

The defendants the assignees, by their answer, admitted the existence of the various letters and documents mentioned in the bill, and that they had declined to perform the alleged agreement; but they submitted, that, without the sanction of the Court, they could not relinquish and surrender a valid and existing lease, in which four persons were liable to pay certain specified rents, and sign another lease, at much less rents, to two only of the four lessees. They also submitted, that the offer on the part of Hugh

[ \*615 ]

Parker the elder, to accept reduced rents and grant a new lease to two of the original lessees only, was purely voluntary on his part, and without any valid consideration, and, not being completed at the time of the bankruptcy, could not be carried into effect by the defendants, unless under the direction of this Court. They further submitted whether the signing by Hugh Parker the elder of the words "approved by me, H. Parker," at the foot of the memorandums mentioned in the bill, was duly signing such memorandums. They did not, however, by their answer, insist on the Statute of Frauds.

Parker c. Smith.

The cause came on for hearing before Knight Bruce, V.-C., in February, 1844, when his Honour expressed his opinion to be, that the plaintiffs were not then entitled to a decree for relief, neither a sufficient consideration for, nor any act of part-performance of, the agreement, appearing upon the pleadings; but that, the Statute of Frauds was out of the case, the defendants not having pleaded it, or insisted upon it, and a valuable consideration might \*be proveable by extrinsic evidence; and also that, upon further investigation, acts amounting to part-performance of the agreement, supposing them capable of being material, might possibly appear. consent of the plaintiffs and the defendants other than the assignees. and the assignees not opposing) his Honour directed a reference to the Master to inquire whether, after the granting of the lease in the pleadings mentioned, any, and what, agreement for the surrender thereof, and for granting a new lease of the property therein comprised, was ever, and when, entered into between Hugh Parker the elder and the lessees, or any, or either, and which of them; and whether verbally or in writing, and to what effect, and for what consideration, and under what circumstances; and whether, upon the faith of any, and what, agreement or promise by the said Hugh Parker, any, and what, acts or act affecting or relating to such lease or property was or were ever, and when, done by the said lessees, or any or either, and which of them, &c.

[ \*616 ]

The Master, by his report, found that, in April, 1841, a parol agreement was entered into between the parties, that, in consideration of the lessor, Hugh Parker, accepting a surrender and granting a new lease, the partnership should be dissolved, and the retiring partners indemnified, and that the new lease should be granted to the plaintiffs alone, at reduced rents, to be ascertained by a person to be appointed by the lessor; that this agreement was afterwards varied as to the manner in which the coal should be gotten and the

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[ \*617 ]

[ \*618]

rents ascertained, and that the terms of the original and varied agreement were stated in writing, and contained in a document of April, 1841, and the letters and report and memoranda mentioned in the bill.

In addition to the documentary evidence, the Master had received

the affidavit of Hugh Parker the elder, (which was made after he had obtained his certificate), and the affidavits of Mr. Haywood, Mr. Jeffcock, and \*another person. The document of April, 1841, mentioned in the Master's report, is referred to in Hugh Parker's affidavit.

To this report exceptions were taken by the defendants the assignees, on the ground that there was no agreement for the surrender of the original lease and granting a fresh lease, or, if there was, there was no consideration for such agreement.

The cause now came on for argument upon these exceptions, and also upon further directions.

On this argument, the draft lease which was prepared in pursuance of the fresh agreement was used in evidence. the 2nd August, 1842, from which date the term of forty-two years was made to commence, and the reddendum was as follows: "Yielding, &c., unto the said Hugh Parker, his heirs and assigns, during the said term, the following rents, &c., viz. for every superficial acre of coal to be raised and gotten by the said Hugh Parker the younger, and John Rhodes, their executors, administrators, or assigns, from that part or portion of the said Upper bed of coal hereby demised, which lies above the level hereinbefore mentioned, the rent or sum of 1251., and for every superficial acre to be raised and gotten as aforesaid from that part or portion of the same bed of coal which lies below the said level, the rent or sum of 150l., and for every superficial acre of coal to be raised or gotten as aforesaid from the said Lower bed of coal hereby demised, the rent or sum of 300l., and so in proportion for any less quantity than one acre, which may be raised or gotten as aforesaid from either or any of the said beds or portions of beds; and in case, in any one halfyear during the first five half-years of the said term, the quantity of coal that shall have been actually raised and gotten as aforesaid, from and out of the said beds, or either of them, shall not, according to the rates or rents aforesaid, amount to or produce the sum of 150l., then yielding, &c., such additional or further sum \*of money or rent as will, with the coal so actually raised and gotten as aforesaid, (if any), amount to and make up the said sum of 1501,

according to the rates or rents aforesaid; it being understood and expressly agreed, by and between the said parties hereto, that the said Hugh Parker the younger, and John Rhodes, their executors, administrators, or assigns, shall, during the first five half-years of the said term, pay the rent or sum of 300*l*. per year at the least, although they shall or may not have actually raised and gotten coal to that amount or value, or any coal whatever."

PARKER t. Swith

Mr. Bigg, for the exceptions, contended that there was no consideration to support the agreement set up by the bill and found by the Master. It could not be for the lessor's benefit to have a certain rent of 600l. reduced to 300l. Neither was it any advantage to him, that two of the partners should undertake the responsibility of the four. On the other hand, that circumstance was no detriment to the two, but an advantage. The colliery was not sufficient to afford a living for the four, and the two did not take upon themselves any engagement to which they were not before liable. The bill did not proceed on the ground of a parol agreement part performed, but on that of a complete agreement signed by the parties. The defendants, therefore, had been deprived of the advantage of pleading the Statute of Frauds, though, if the affidavits relied on by the Master had been stated in the pleadings, it would have been otherwise.

The argument having closed for the day, it was agreed by all parties, on the following morning, at the suggestion of the Vice-Chancellor, that the case made and stated by the affidavits of Hugh Parker [the elder], Haywood, and Jeffcock, should be considered and treated as made and stated by the bill, and that the answer of the assignees should be \*considered and treated as if it had insisted on the Statute of Frauds.

[ \*619 ]

The affidavit of Hugh Parker the elder, after stating that the lessees, after expending considerable sums of money on the colliery, had found the Manor bed to contain coal of very inferior quality, contained the following passages: "That, having ascertained the state of the said mine, and the state of the said coal, to be as above mentioned, and it having been frequently, and particularly in or about the month of December, 1840, represented to this deponent by the said lessees, (and as this deponent did and does believe to be the fact), that, under such circumstances, the said colliery must be a losing if not a ruinous concern to the said lessees, unless an alteration were made in the amount of rent; he the deponent, in

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[ \*617 ]

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R. R. 304 (14 Ves. 386).

PARKER v. Smith.

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or about the spring of the year, 1841, promised and agreed with the said lessees to reduce the amount of the said rent, and to revise the terms and stipulations contained in the lease. That he was also desirous that the said John Parker and James Rhodes should retire from the co-partnership, this deponent being satisfied that even with a considerable reduction of the rents reserved in and by said lease, the profits of the colliery would not be sufficient to maintain the families of the said four partners. That he, therefore, proposed and stipulated, that the said partnership should be dissolved, and that the said John Parker and James Rhodes should retire therefrom, and that the colliery should in future be carried on by the said plaintiffs alone; and this deponent at the same time promised, that, in consideration thereof, he would have the said colliery examined by some competent person, with a view of ascertaining the amount to which it would be fair and proper that the said rents should be reduced, and that, upon such reduced amount being agreed upon, the said lease should be surrendered by the said lessees, and that a new lease of the said colliery should be granted to the said Hugh Parker the \*younger, and John Rhodes, at such reduced rents. That his said proposal and stipulation was adopted and agreed to by the said lessees, and it was in consideration thereof agreed and arranged between this deponent and the lessees, that the partnership should be dissolved so far as related to the said defendants, John Parker and James Rhodes, and that the said plaintiffs should take upon themselves all the existing and future liabilities and risks thereof; and thereupon, at the instance and request of this deponent, the said plaintiffs, Hugh Parker the younger, and John Rhodes, drew up certain proposals in writing, in the words and figures following, and sent a copy thereof to this deponent: that is to say,—"April, 1841. Our landlord, Hugh Parker, Esq., having stated, that, in the event of the Sheffield Coal Company not becoming tenants for the Woodthorpe Colliery, we, John Rhodes and Hugh Parker, jun. were to become sole partners, and were to arrange matters regarding future proceedings of said collieries; we, having therefore taken into consideration all circumstances, do agree to the proposal that the Woodthorpe Coal Company shall only consist of two partners, Hugh Parker, jun., and John Rhodes, and do further propose, that each shall have an equal amount of share or shares."

In a subsequent part of his affidavit the deponent stated, that he did, on the 6th December, 1842, in pursuance of his promise made

to the plaintiff previous to and as an inducement for the dissolution of the partnership, sign the memorandums mentioned in the bill, by writing at the foot of them "Approved by me, H. PARKER."

PARKER v. Smith.

Mr. Bigg, in continuation:

Assuming that the case now rests on the footing of part-performance, it is clear that the contract was not complete till December, 1842. In that month Hugh Parker signed the memorandums, and he says that he did so in pursuance of his promise made to the plaintiffs before the dissolution of the partnership. \*But how can an act done in July, 1841, which was the period of dissolution, be in part-performance of a contract of December, 1842? The acts of part-performance cannot, by any means, precede or be preliminary to the contract: they must, of necessity, arise after the contract is complete: O'Reilly v. Thompson (1); and must be so unequivocal in their nature as themselves to raise the inference of the existence of an agreement: Frame v. Dawson (2).

[ •621 ]

The remaining point is, that the terms of the agreement are not certain. Something dehors must be introduced to fix the contract. The head rent is not fixed. All above it is to be "according to Mr. Jeffcock's scale." But Mr. Jeffcock's scale gives two rents, and is an uncertain standard of reference. The engrossment of the release is not part of the documentary agreement, any more than it is part-performance.

Upon the whole—1. There is no valuable consideration to support the agreement. 2. The agreement is not in writing and signed under the Statute of Frauds. 3. There is no part-performance to take the case out of the statute. 4. The agreement is uncertain in its nature. And the case being heard upon further directions and exceptions, the bill must be dismissed.

Mr. Swanston and Mr. Tillotson, for the plaintiff.

Mr. Russell and Mr. Bacon, for the defendants John Parker and James Rhodes.

### THE VICE-CHANCELLOR:

Notwithstanding the obscurity of this case, having had the benefit of a full and able argument, and having, since the Court rose yesterday, read the bill and considered the case, I am prepared to give an opinion upon it.

(1) 2 R. R. 41 (2 Cox, 271).

(2) 9 R. R. 304 (14 Ves. 386).

PARKER c. SMITH.

It occurred to me last night, and the opinion remained this morning, as far as I could entertain an impression without having heard the case throughout, that the probable result would be, that I should find it my duty to dismiss the bill without prejudice to a new suit. If this had been done the consequence would in all probability have been, that within a week a new bill would have been filed, adapted to the circumstances of the case. It was on that account, therefore, though without stating my reasons, that I made the suggestion which I did this morning at the sitting of the Court—a suggestion in which all parties have acquiesced, and, I think, wisely.

(His Honour then, after observing that the counsel who prepared the bill had not been furnished with a statement of the facts as they appeared in the Master's office, and had consequently framed the charges in such a manner as to render it unlikely that they should be met by a plea of the Statute of Frauds, proceeded thus:)

A mere agreement between A. and B., A. being indebted to B., that B. shall take from A. a sum less than the amount of his debt in discharge of his liability, is nudum pactum. An agreement between landlord and tenant that the lease shall be surrendered. and a new lease taken, although the only change be an abatement of rent, may stand on a very different footing. Here, according to the bill, there was an agreement on the part of the landlord that the rent should be prospectively reduced, and (without any consideration that I can see, unless you add the letter from Hugh Parker [the elder (1) to John Parker, which, however, has no consideration apparent upon it) that two of four partners jointly and severally liable should be discharged from their obligation. If, therefore, this matter rested upon the written documents, I should probably have felt it impossible to give relief, as the bill is framed; and no relief ultra the written documents is prayed. The bill, however, is now to be read as \*if it made the case stated in the affidavits, including the affidavit of Hugh Parker [the elder], part of which I will now read; first observing, however, that Mr. Bigg's observation, upon the notion of part-performance of an agreement before the agreement is made, seems well-founded. But the question is, whether, taking Hugh Parker's affidavit as statement only, there is not a valid agreement stated anterior to December, 1842. here read that portion of Hugh Parker's affidavit, which is included between inverted commas.)

[ \*623 ]

(1) Dated the 14th September, 1841, ante, p. 218.

tion of the promise of Hugh Parker [the elder], Mr. Jeffcock surveyed and made his report. His report was agreed to before the The words "approved by me" were written before bankruptcy. that time. Now, the first question is, whether, the statements in that affidavit, considering them as charges and statements in the bill, amount to an allegation of an enforceable agreement; my opinion is that they do. The landlord of a coal set, having four tenants, partners, holding under a lease of which there are several years to come, and which reserves a rent that circumstances show to be beyond the value, (in fact a very heavy rent), enters into an agreement with the four lessees, of whom two are his sons, that from the partnership one of his sons and one of the two others shall retire, so that the benefit of the lease and business of the colliery shall remain to the other two, and that, this being done, the landlord will not only consider the subject of rent, but will refer the subject to a competent person, and, on the report of that competent person being made, will, if the report shall seem right, adopt it, and grant a new lease. That is a valid and binding agreement, an agreement for valuable consideration, and involves, as part of its terms, not merely a surrender and new lease, but a relinquishment of the interest of two partners; one of them being the landlord's \*The dissolution so agreed upon takes place; the release so agreed upon takes place, by which two of the lessees, the plaintiffs, take upon themselves alone the liability which before was shared

by the four. It has been urged by Mr. Bigg that, under the circumstances of the case, this was no part-performance of the agreement, and, in support of his argument, he cited O'Reilly v. Thompson and

done was not distinctly referable to any agreement. It might and would have been done without any agreement: it was a matter of duty independently of any agreement. In O'Reilly v. Thompson the agreement was between two, and not between the three. Here, the agreement is between the five—between the four and the one, and not the two and the one; and it is part of the entire

The affidavit states the facts that are agreed upon. In considera-

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| \*624 ]

The next question is, whether Hugh Parker's affidavit is to be believed. (His Honour here remarked upon the credibility of

do take place. It is impossible to treat these acts otherwise than as acts of part-performance, taking the case out of the Statute of

agreement that the dissolution and release shall take place.

In Frame v. Dawson the act

Frauds.

Frame v. Dawson—both good cases.

PARKER t. SMITH.

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Hugh Parker's affidavit, which he said, notwithstanding some degree of looseness, and notwithstanding that the parol agreement mentioned in it was not referred to in the written documents. he entirely believed. He then proceeded thus:) What would have been the result, if, before the bankruptcy, Mr. Parker had refused or neglected to appoint a person to survey, or, having appointed him, had refused to accede to his report, whether altered or unaltered, I need not say. Greater difficulties, possibly insurmountable ones, would have been in the way of the plaintiffs. that state of things does not exist. For valuable consideration the agreed reference is made, and the result of the reference is acceded I am of opinion that in this case the Statute of Frauds being \*out of the question, there was a complete contract; that a valid parol agreement was in part performed within the meaning of that expression as used in courts of equity, and that every step was taken on each side which rendered it compulsory upon Hugh Parker to perform it before the bankruptcy.

It is said, however, that there is uncertainty in the agreement. In my view of the case, that question, perhaps, does not arise. The parties have construed the agreement in a manner the most favourable to the landlord; and I think that I shall, in this case, do justice if I hold them to that construction. The draft, in its present state, was approved by Hugh Parker or his solicitor, before the bankruptcy. I think it was completely binding as to the inception of the new term, and the inception of the varied rent.

Upon the exceptions and further directions—declare, that the exceptions be neither allowed nor over-ruled. Let the deposit be returned. Declare the plaintiffs entitled to have the agreement entered into between them and Hugh Parker the elder, and the defendants John Parker and James Rhodes specifically performed. And let the defendants, the assignees, accept a surrender of the existing lease, and execute the lease that has been prepared and engrossed.

### GOSLING v. CARTER.

(1 Coll. C. C. 644-653; S. C. 14 L. J. Ch. 218; 9 Jur. 324.)

1845. Jan. 29, 30. Feb. 21.

An executor's implied power to sell real estate under a general charge of debts is not restricted by an express direction that the executors shall sell BRUCE, V.-C. the real and personal estate at the death of the testator's widow, but it seems that the implied power operates only on the equitable interest (1).

KNIGHT [644]

James Lloyd, by his will, dated 4th November, 1843, directed all his just debts, funeral and testamentary charges and expenses, to be paid out of his estate and effects; and subject thereto, and also to the payment of 5l. to his executor, thereinafter named, for his trouble in taking upon him such office, he gave and bequeathed all his freehold, copyhold, leasehold, personal, and other his real and personal estate whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, unto his dear wife Susannah, during the term of her natural life, for her sole and separate use, and free from the debts and control of any future husband she might intermarry with; and from and after her decease, he directed all his real and personal estate and effects to be sold, either by private sale or public auction, for the best price that could be got for the same; and after payment of the expenses of such sale and incident thereto, he directed the produce thereof to be divided and paid in the following manner (that is to say), one equal part thereof to the children of his sister Mary Neale, widow of Thomas Neale, if more than one, in equal shares and proportions, and if but one child, then to such only child; and as to one other part, &c. testator gave the three remaining fourth parts of the produce in the same form to the children of three other different persons named in the will.) And the testator directed that the purchaser or purchasers of the whole or any part of his real or personal estate should not be liable to see to the application of the purchasemoney; \*and that the receipt and receipts of his executor, his heirs, executors, administrators, and assigns, or other person or persons acting in the administration of that his will, should be a sufficient discharge or sufficient discharges to the purchasers of the whole or any part of the real or personal estate directed to be sold under that his will. And he directed that his said executrix and executor, and their respective heirs, executors, administrators. and assigns, should retain to and reimburse herself, himself, and themselves, all loss, costs, charges, damages, and expenses, which she, he, or they, or any of them, might sustain, pay, suffer, or be

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<sup>(1)</sup> On this point see Doe v. Hughes (1851) 6 Exch. 223, 20 L. J. Ex. 148.

Gosling r. Carter. put unto in the execution of his will; and that neither of them should be answerable or accountable the one for the other, nor for involuntary losses. And he appointed his wife Susannah executrix, and W. Gosling executor of his will.

The testator died shortly after the date of his will, which in December, 1849, was duly proved by the executrix and executor.

Upon the allegation that the testator was considerably indebted at his death, and that his personal estate was not sufficient for the payment of his debts, his executor and executrix caused his real estate to be put up for sale, in lots, by public auction, on the 6th of May, 1844. By the fifth condition of sale, the purchaser, in case he should require the testator's heir-at-law to be party to the conveyance, was to be at the expense of tracing his pedigree and obtaining his concurrence in the sale; and by the eleventh condition, it was provided, that the executrix, Susannah Lloyd, should, if required, disclaim any life-estate she might be supposed to have in the premises, or any part thereof.

At the sale, John Carter, the defendant, was declared the purchaser of a piece of freehold land, forming Lot 2, at the sum of 155l., and he entered into and signed an agreement for the purchase, and paid his deposit. An abstract \*of the title of the vendors to the premises was afterwards delivered to him.

The bill which was filed by the vendors to enforce specific performance of the agreement, charged that in the course of the correspondence which took place between the solicitors of the respective parties, the plaintiffs' solicitor distinctly apprised the defendant's solicitor that the testator's personal estate was insufficient for the payment of his debts, and that the sale had been made by the executors for the purpose of raising a fund for the discharge of such debts; and that the plaintiffs had also informed the defendant that the testator's widow was willing to disclaim her life-interest, and to release her dower, by which means, as the plaintiffs insisted, the power of sale contained in the will would be accelerated.

The defendant by his answer insisted, that, the property in question not having been devised by the testator to the plaintiffs in trust for sale, and for the payment of his debts, but having been merely charged with the payment of them, the legal estate was vested in the plaintiff Susannah Lloyd, the testator's widow, for

[ \*646 ]

her life, and the reversion in fee expectant on her decease belonged to the testator's heir-at-law; and that the plaintiffs, as executors, were unable, without the heir-at-law joining, to make a good and complete conveyance to a purchaser, and, in fact, had not any power to sell. Moreover, that the only period appointed by the testator in his will for the sale of all or any part of his hereditaments was after the death of his widow, and that the different persons intended by the testator to take the benefit of the reversionary fund, and among whom the produce of the sale of his real and personal estate was to be divided, were not capable of being ascertained until the period of such distribution should have And although the defendant admitted that the plaintiffs had given him such information as to the object of the suit as \*charged in the bill, yet he stated, that, during the whole of the correspondence between the respective solicitors, the necessity of selling the whole of the real estate of the testator, or, in particular, the hereditaments comprised in Lot 2, had never been shown.

Gosling t. Carter.

[ \*647 ]

The cause now came on for hearing.

Mr. Wigram and Mr. Hardy, for the plaintiffs, relied on Shaw v. Borrer (1), Ball v. Harris (2), and Forbes v. Peacock (3), as showing, that, under the charge of debts the plaintiffs had an implied power to sell and to give receipts for the purchasemoney. They also contended, that the heir-at-law was not a necessary party to the conveyance; but that, if he was, that was a mere question of conveyance, and that the fifth condition of sale, which had been adopted by reason of the difficulty of finding the heir, imposed the expense of solving that question on the purchaser.

### Mr. Teed and Mr. Goldsmith, for the defendant:

The question is, whether a general charge upon the testator's estate gives an implied power to the executors to sell for payment of his debts. In Shaw v. Borrer, and Ball v. Harris, a legal estate in fee was vested in the devisees in trust, or one of them; and the sale was made by or with the consent of the devisees. Here, there is no party who can give his assent to the sale of the fee. If in cases of this nature the executors alone have power to sell, the

<sup>(1) 44</sup> R. R. 115 (1 Keen, 559). My. & Cr. 264).

<sup>(2) 42</sup> R. R. 234 (8 Sim. 485; 4 (3) 54 R. R. 343 (11 Sim. 152).

GOSLING v. CARTER,

[ \*651 ]

was the intention of the testator that the estate should be sold for the payment of his debts. Without opposing the whole current of authorities, I cannot say that the general charge does not exhibit that intention. If that be right, the question is, by whom it is to be sold. Under this particular will it could only be sold by the executors or one of them, or by the heir-at-law; but I am of opinion, upon this will, that the intention to be collected is, that the heir-at-law should have nothing to do with it.

The testator gives and bequeaths, in a mass, all his real and personal estate to his wife for her life, and directs that, after her death, his real and personal estate shall be sold altogether. So that, if his intention was, that his real estate should remain unsold till that time, it was equally his intention that the personal estate should remain unsold to the same period—a provision which, as against creditors, would be unmeaning. He then declares that the purchasers of the whole or any part of the real and personal estate shall not be liable to the application of the purchase-money, \*and that the receipt or receipts of his executor shall be a sufficient discharge or discharges to the purchaser of the whole or any part of the real or personal estate directed to be sold. This is the will of a testator who has used expressions which the law construes as authorizing an immediate sale by some person; because he creates a charge in favour of persons who are not bound to wait for payment. When I consider that in this will the real and personal estates are confounded together-when I find the recognition of the right or power of the executor to give receipts-when I find the executor joined with the wife, and that they both sell-I think it impossible to say that this property has not been sold by the persons, or one of the persons, by whom the testator says that it should be sold.

It is not necessary now to say whether the sale can be completed without the joining of the testator's heir-at-law in the conveyance, or, in other words, without his concurrence. In my judgment, he is bound to give that concurrence, if necessary, upon the requisition of the executrix and executor and the purchaser. Whether the executor and executrix have power, without him, to confer the legal estate, I say not. What I should have done with this case, upon the assumption that there were no debts when the sale was made, I say not. I proceed upon the basis that there were debts at that time.

The plaintiff undertaking to prove that there were debts of the testator owing and unsatisfied at the time of the contract in question—declare that the plaintiffs had full power to enter into the contract, and to make the sale that they contracted to make, without prejudice to any question whether the testator's heir-at-law will or will not be a necessary party to the conveyance.

GOSLING r. CARTER.

The proof of debts having been given pursuant to the plaintiffs' undertaking, the cause now came on again for hearing.

Feb. 21.

Mr. Wigram and Mr. Hardy, for the plaintiffs, referred to Tylden v. Hyde (1) and Ward v. Devon (2), as showing that the joining of the heir-at-law in the conveyance was not necessary.

[ 652 ]

#### THE VICE-CHANCELLOR:

In this will there is an express power of sale, and but one; and that express power of sale is given so as not to arise till after the death of the testator's wife. The testator's wife is alive, and I decline deciding against the purchaser, (whatever may be my own opinion, if I have an opinion directly upon the point), that, whether the wife disclaims or does not disclaim, or has disclaimed or has not disclaimed, that express power of sale is now capable of being exercised or has been so. For the purpose, therefore, of this cause, it being a suit for specific performance, (however the point might be abstractedly decided), it must be taken that the express power of sale is not now exercised or exercisable.

But there is an implied power of sale; because the life-interest of the wife is subject to the general charge for payment of debts. Therefore, in a sense, and in a manner, there does exist a power of selling during the lifetime of the wife, there being debts—which fact is proved. And I am of opinion that there is, upon this will, an intention exhibited that a sale, if made, should be made by the executors or one of them, and not otherwise.

The next question is, whether this intention is expressed so as to create a legal power; in which case the concurrence of the heir-atlaw would not be necessary. I am of opinion that this question is one of too great nicety and difficulty to decide against the purchaser. If he wishes \*the concurrence of the heir, he must pay or not pay

[ \*653 ]

<sup>(1) 25</sup> R. R. 194 (2 Sim. & St. R. R. 271 (4 Madd. 44), 11 Sim. 160, 238).

<sup>(2)</sup> See Bentham v. Wiltshire, 20

GOSLING r. Carter. for the discovery of the heir according to his contract. Upon that I give no opinion. But I think that in this suit he is not to be compelled to take the title from the executor and executrix without the concurrence of the heir.

I decide, therefore, without prejudice to the question whether the heir is or is not a necessary party to the conveyance, that the executor and executrix, as debts are admitted to have existed at the time of sale, had power to sell.

It being admitted that the testator James Lloyd was, at the date of his will, and thenceforth to the time of his death, seised in fee simple of the estate which is the subject of the contract in the pleadings mentioned, and that, at the date of such contract, there were debts of the testator remaining unsatisfied—declare, that the plaintiffs, as executor and executrix of the testator, had in themselves good right and power to sell the estate by that contract. Declare, that, if the testator left an heir-at-law, the defendant ought not to be compelled to complete the purchase without a conveyance from such heir-at-law. Refer it to the Master to inquire whether a good title can be made to the premises, having regard to the preceding declarations. No costs to this time. Reserve subsequent costs and further directions, with liberty to apply.

1845. *Feb*. 18.

KNIGHT BRUCE, V.-C.

# WILDING v. RICHARDS.

(1 Coll. C. C. 655-661; S. C. 14 L. J. Ch. 211.)

The obligor of several bonds in which A., his solicitor, joined as surety, conveyed certain real property to A., upon trust to sell, and out of the proceeds of the sale to pay the bond creditors. The creditors did not execute, nor had any notice of the deed: Held, that the deed was a mere deed of agency, and not binding in favour of the creditors, but that A. was entitled to retain the estates conveyed to him, until he should be discharged from his liability as surety under the bonds.

Samuel Wilding, being absolutely seised of certain freehold and copyhold estates, situate in the township of All Stretton, and possessed of a considerable personal estate, made his will, dated in May, 1832, whereby, after giving his personal estate to his mother, and exonerating the same from the payment of his debts, he devised all his real estate to trustees upon trust for sale and payment of his debts, and directed the surplus to be invested in real estates and conveyed to the use of his brother Henry Wilding for his life, with

remainder to his issue in strict settlement, with remainder to the testator's right heirs. And the testator appointed the trustees to be his executors.

WILDING v. RICHARDS.

After the date of his will, the testator purchased certain freehold and copyhold estates in the township of All Stretton which were conveyed to him in fee simple; the copyhold estates being held of the manor of Stretton-en-le-Dale.

The testator, who survived his mother, died in July, 1832, intestate as to the after-purchased estates, leaving his brother Henry his heirat-law, and heir according to the custom of the manor of Stretton-en-le-Dale; and Henry \*entered into possession both of the devised and descended estates.

[ \*656 ]

By an indenture, dated the 31st of January, 1833, made in contemplation of the marriage of Henry Wilding with the plaintiff Mary Wilding, (which marriage took place in August, 1833), reciting a bond of even date, under the hand and seal of Henry Wilding, whereby the sum of 5,000l. and interest was secured to be paid by him to John L. Richards and J. Rowlands within twelve months after the marriage, and reciting that Henry Wilding had agreed that such sum should be charged upon his freehold and copyhold estates, it was thereby covenanted and agreed by Henry Wilding that his freehold and copyhold estates in the township of All Stretton, and within the manor of Stretton-in-the-Dale, should stand charged with and be a security for that sum and interest. And in the same indenture, trusts were declared of the 5,000l. and interest for the benefit of the intended husband and wife, and the issue of the marriage.

Henry Wilding died in May, 1835, having by his will, dated in April, 1835, directed payment of his debts, and devised his real estates to trustees, whom he appointed his executors, upon trust to sell or mortgage the same for that purpose, and having bequeathed a legacy of 1,000l. to his widow, and devised the surplus of his real estate to his son Richard Wilding absolutely, with an ulterior limitation to his daughter Mary S. Wilding, in the event of his son dying under twenty-one, without leaving issue.

The bill was filed by Mary Wilding and Mary S. Wilding who (except Richard) was the only child of Henry Wilding, against the trustees of the settlement, the trustees and executors under the respective wills of Samuel and Henry Wilding, Richard Wilding, and several persons whom the bill alleged to have claims as incumbrancers upon the estates devised by Samuel Wilding, and upon

WILDING 9. RICHARDS. [\*657] those which descended from Samuel to Henry, praying that the trusts \*of the settlement might be carried into execution, and that for that purpose the estates of the two testators might be duly administered.

By the decree made on the hearing of the cause, the Master was directed to inquire whether certain indentures of lease and release in the pleadings mentioned, bearing date the 13th and 14th October, 1832, and made between Henry Wilding of the one part, and John William Watson (a defendant to the suit) of the other part, were binding in favour of any, and what, parties, as between Henry Wilding, or his estate, and his creditors.

The circumstances attending the execution of these deeds appeared from the Master's report to be as follows:

Samuel Wilding and Henry Wilding, with the defendant Watson, (who was their solicitor), as their surety, executed two joint and several bonds, dated respectively in the months of April and November, 1828, for securing the payment of two sums of 4,000l. and 500l. and interest, and in the month of January, 1830, they executed another joint and several bond, for securing the sum of 600l. and interest. After the death of Samuel Wilding, the relation of solicitor and client still subsisting between Henry Wilding and Watson, the deeds of lease and release in question were executed. By the release, Henry Wilding conveyed all the freehold estates and covenanted to surrender all the copyhold estates, which had descended to him from his brother, to Watson and his heirs, to hold the same, subject to certain mortgages affecting the same respectively, upon trust to sell and to pay off the sums due upon the mortgages, and, out of the surplus, to pay the several bond debts then due and owing from Samuel Wilding, deceased, or from Henry Wilding, with interest, and after satisfaction of the mortgages and bond debts, to pay the residue of the proceeds of the sale to Henry Wilding, his executors, administrators, or assigns, and in the meantime to stand seised \*and possessed of the premises in trust for H. Wilding, his heirs and assigns.

[ \*658 ]

These deeds were not executed by any of the creditors, nor did it appear that any of the creditors had notice of them.

Shortly after the execution of them, namely, on the 25th of October, 1832, J. W. Watson was admitted as tenant to some of the copyhold estates. On the Court rolls he was described as mortgagee of the premises. During the life of Samuel Wilding, and subsequently up to the death of Henry Wilding, in May, 1835, Watson

received the rents of these estates; but, according to his own statement, he received them as solicitor and agent of H. Wilding. It did not appear that, under the powers given him by the deed, he had sold or mortgaged any of the premises, but he had made certain payments under it.

WILDING v. RICHARDS.

The Master having found that the indentures of the 18th and 14th of October, 1832, were not binding in favour of any parties as between Henry Wilding or his estate and his creditors, exceptions were taken to his report by the defendant Watson, which exceptions now came on for argument.

## Mr. Russell and Mr. Terrell, for the exceptions:

First, whatever may be the effect of the deeds of October, 1832, in relation to the creditors, it is clear that Watson, to whom the property is conveyed, is not a mere volunteer. If Henry Wilding had attempted to call back the conveyance from him, Watson might have resisted that attempt, on the ground that Wilding had contracted by means of the deeds in question to release him from his liability, and that, until the bonds were discharged, the deeds must have effect, so far, at least, as he was concerned: Small v. Marwood (1).

But secondly, this deed, whether to be postponed or not to the settlement, is a binding deed in favour of the creditors. The cases on this subject proceed on different grounds. In Garrard v. Lord Lauderdale (2), the Vice-Chancellor of England considered that a deed of trust, to which the creditors are not parties, is an arrangement solely for the benefit of the debtor, and that the creditors are not in the situation of cestui que trusts. On the other hand, in Acton v. Woodgate (3), Sir J. Leach treated such a deed as a power of distribution revocable by the debtor, and binding in favour of creditors until revoked. If that be a correct ground of decision, it follows, that, in this case, there was an ambulatory power during the lifetime of the testator Henry Wilding, which power has become irrevocable by his death.

# THE VICE-CHANCELLOR:

But for the authorities on this subject, I should possibly have felt myself bound to give effect to this deed; the trustee took upon

[659]

<sup>(1) 32</sup> R. R. 689 (9 B. & C. 300). (3) 39 R. R. 251 (2 My. & K. 492).

<sup>(2) 30</sup> R. B. 105 (3 Sim. 1).

WILDING RICHARDS. himself to act under it, and it is not alleged that the deed in form was in any respect contrary to the intention of the parties.

But the state of the authorities (according to my apprehension binds me to act in a manner which may possibly be against the opinion, that, in the absence of those authorities, I should have entertained; and I must treat the deed as not having effect, subject to this: that all payments by the trustee or agent made in the proper execution of the trust or agency under it must be allowed to him; and, as Mr. Watson had himself an interest, when the deed was executed, in the payment of the bonds in which he was a surety, I wish to have the point argued, (if it is contested), whether the estate can be taken from him without paying those bonds.

[ 660 ]

Mr. Wigram, Mr. Bird, and Mr. Rogers, for the report:

In order to raise a trust in favour of Mr. Watson, there ought to be some exhibition of intention on the deed to give him a lien. Although Watson was a surety, yet it is clear that the instrument, on the face of it, does not refer to him as surety. He was, during the whole of the transaction, Henry Wilding's solicitor. he gets his client to execute a deed which the law says shall have The Court will not allow a solicitor to call a deed into no effect. action for a purpose foreign to the purport of the deed. although Watson sets out the deed, he does not in the pleadings suggest that it was intended to be executed so as to give him any Moreover, he says that he received the rents as agent and Under these circumstances, upon what principle can the Court say that he, as surety, shall have any benefit from the deed? If he can have no benefit in that character, and we submit he cannot, the deed is one of mere agency, created for the convenience of the debtor, and raises no trust for creditors: Wallwyn v. Coutts (1), Garrard v. Lord Lauderdale (2), Acton v. Woodgate (3), Bill v. Cureton (4). Considering it in the light of an authority given to an agent, it is an authority revoked by the death of the principal.

#### THE VICE-CHANCELLOR:

I am of opinion that the authorities do not compel me to say that such estate (if any) as became vested in Watson by means of this deed, or by any surrender of the copyhold which may be connected

<sup>(1) 17</sup> R. R. 173 (3 Mer. 707; 3

<sup>(3) 39</sup> R. R. 251 (2 My. & K. 492).

Sim. 14).

<sup>(4) 39</sup> R. R. 258 (2 My. & K. 503).

<sup>(2) 30</sup> R. R. 105 (3 Sim. 1).

with the deed, can be taken from him without discharging him from the two bonds. I think that upon the present occasion, and as circumstances stand, he has an equity to say so, which must be attended to in this suit.

WILDING v. RICHARDS.

# MANNINGFORD v. TOLEMAN.

(1 Coll. C. C. 670-675; S. C. 14 L. J. Ch. 160; 9 Jur. 438.)

1845. Feb. 15.

KNIGHT BRUCE, V.-C. [ 670 ]

Bankers take from a customer an equitable mortgage by deposit of titledeeds of property conveyed to him in fee simple a few days previously. The property comprised in the deeds is subject to a trust of which the bankers have no notice, and the deposit is made in breach of that trust. The trust must prevail against the bankers' lien.

A sum of 3,000l. is paid to a person out of the Court of Chancery upon his undertaking to apply 2,000l. of it in the purchase of a suitable house for himself and wife, which he is to convey to the trustees of his marriage settlement upon certain trusts, and to apply the remaining 1,000l. in setting himself up in business. Upon the receipt of the 3,000l. he pays the whole to his bankers. He afterwards draws out nearly the whole amount in various sums at various times. Amongst the drafts is one which he delivers in payment for the purchase of a house suitable for himself and wife. Having procured the house to be conveyed to himself in fee, he deposits the title-deeds with his bankers, as a security for advances, without notice to the bankers of the trusts of the settlement. In considering the conflicting claims of the bankers and the trustees of the settlement with respect to the house, it must be presumed that the purchase-money for the house was paid out of that portion of the 3,000l. which was properly applicable to that purpose.

In October, 1830, John Seymour Cock, who carried on business as a cabinet-maker, at Bristol, married Clarissa Foxon, of the same place, who was a ward of this Court, and entitled to considerable real and personal estate, the latter being in the custody of this Court in a cause of Foxon v. Foxon.

In March, 1831, the Master, to whom the cause of Foxon v. Foxon was referred, made his report, by which he stated that the friends of Mrs. Cock and her husband were desirous that Cock should commence business as a timber merchant, and that it was desirable that a proper house should be purchased for him and his wife; and that Cock had proposed that 3,000l., part of his wife's fortune, should be raised and paid to him out of the trust funds, whereof 2,000l. should be paid to him to enable him to purchase a proper house and furniture for himself and his wife—such house and furniture when purchased to be conveyed and assigned to trustees, upon trust for the benefit of his wife and also of himself, in case he should survive her and there should be retained by himself,

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[ \*671 ]

to enable him to commence and carry on the trade or business of a timber merchant. And the Master stated that he approved this proposal.

The Master's report having been confirmed, and it having been referred back to him to approve of a settlement, an indenture of settlement, dated the 8th of June, 1831, was executed by the husband and wife, who was then of \*age, and certain trustees, and in that settlement the husband covenanted with the trustees that the house and furniture then intended to be purchased by the husband with the 2,000l. should, when and so soon as the purchase thereof should have been completed, be effectually conveyed and assured by the husband, with or without the wife, to the trustees in trust for the wife for life, and to her separate use during coverture, with remainder to the children in strict settlement, with an ultimate limitation to the husband in fee in the event of his surviving his wife, and there being no children of the marriage.

By the same order by which the Master's report was confirmed, it was ordered, that, upon the Master certifying the due execution of the settlement, the sum of 3,000l. should be paid to the husband to be by him applied in manner stated in his proposal. Accordingly, the Master having certified to the above effect, the sum of 3,000l. was, on the 2nd of August, 1831, paid by the Accountant-General to J. S. Cock.

On the following day, the 3rd of August, J. S. Cock opened an account with Stuckeys' Banking Company at Bristol, and deposited with them the sum of 2,900l. He also, in the course of the same month, deposited with them a bill in his favour for 50l., payable in November following; but he made no other payments to the Bank. During the same month of August he drew out the whole amount of 2,900l., except 4l. 14s. 6d., by drafts for various sums; one draft of the 25th of August being in payment for a house in St. James's Place, Bristol, of which he took a conveyance, by indentures of the 24th and 25th of August, to himself in fee, and of which he and his wife were for some time in the occupation.

The money so lodged at the Bristol Bank having been thus expended, and the bankers having refused to make to Cock any advances of money without security, he, on the 3rd of September, 1831, deposited with them the title-deeds \*of the house in St. James's Place, and at the same time signed a memorandum to the offect that the deposit was made as a security for any balance which he might then or at any future time owe to their concern.

| \*672 |

On the footing of this deposit, advances were made by the bankers to Cock, and after giving him credit for the 50l. bill, they claimed against him for principal and interest the sum of 376l.

MANNING-FORD TOLEMAN.

Cock afterwards took the benefit of the Insolvent Debtors Act. In the meantime the trustees, having received notice of the bankers' claim, obtained from Cock a conveyance to themselves in fee of the mortgaged premises.

The bill was filed by the registered public officer of the Bank against the assignee of Cock under the Insolvent Act, the trustees of the settlement, and Mrs. Cock and her children, and it prayed that the Banking Company might be declared equitable mortgagees of the house in St. James's Place, and consequential relief as against the several defendants.

The defendant, Mr. Cock, and the trustees, by their answers, insisted on the prior equity of the wife and children under the settlement.

Some evidence was entered into on the part of the defendant Mrs. Cock, to show that the bankers when they took the deposit had notice of the settlement; but in the view taken by the Court, this evidence was unnecessary.

# Mr. Wigram and Mr. Blunt, for the plaintiff:

It is not disputed by the trustees, that when they took the conveyance they had notice of the bankers' lien; but they insist that they had a prior equity. There is no evidence, however, to show that the house was bought with the 2,000l. Why was it bought with the 2,000l. rather than the 1,000l.? The whole 3,000l. was paid to Mr. Cock in one mass. That sum, or the greater part of it, was paid by him into the Bank. He then drew upon the Bank for sums of various \*amounts; but it is impossible to say that the drafts are to be attributed to any specific portion of the money originally paid by him. If the trustees have a better equity than the plaintiff, they must show that the 2,000l. was laid out on the house. Cock's covenant only was, that if he laid out the 2,000l. on a house it was to be settled in such a manner. He did not covenant to purchase a house out of any funds he might happen to have.

[ \*673 ]

Mr. Cooper and Mr. Lean, for the defendant Toleman, the assignee under the Insolvent Act.

Mr. Russell and Mr. Collins, for the defendant Mrs. Cock.

Manning-Ford v. Toleman. Mr. Simpkinson and Mr. Piggott, for the trustees.

It was agreed at the Bar, that, if the question had only been between the trustees and the parties interested under the settlement, the purchase of the house would have been proper for the purposes of the settlement.

#### THE VICE-CHANCELLOR:

The house in question is admitted to have been purchased with part of the 3,000l. The purchase is admitted to have been proper and in due performance, so far, of the purpose for which the 2,000l. had been intrusted to Mr. Cock, namely, to purchase a suitable house for himself and his family. The 1,000l. beyond the 2,000l. was to be applied for the purpose of establishing himself in the business of a timber merchant. Each part of the money was thus appropriated to a particular object. The money was received by him in London on the 2nd of August. He seems to have retained 100l., and paid the remaining 2,900l. into the Bank represented by the plaintiff.

[ \*674 ]

Upon the 25th of August he completes the purchase of the house, and pays the purchase-money by delivering a \*cheque of that date, the 25th of August, upon his bankers, on which day his credit with the Bank consisted of the 2,900l. and a short bill for 50l. cash, however, which had been paid to his credit was the 2,900l. This being the whole of his account on the credit side, there had been drawn out before this date the sum of 930l. 7s. 10d. question, I apprehend, which, if the matter were before a jury, would be put to the jury, is this: The purchase having been made out of the 3,000l., what is the just inference of fact with respect to the portion of the money out of which the purchase was made? I think that the just and unavoidable inference is, that the payment for the house was made out of that part of the money which it was proper and right so to apply, that is to say, the 2,000l. therefore, that at the moment of the purchase a trust was fastened upon the property. Consistently with all the authoritative decisions since the Statute of Frauds, the estate was bound by the trust. Cock was as completely a trustee of it as if he had executed a declaration of trust, not conveying the legal estate. The trustee thus holding the trust property pledges it for a debt of his own. According to the principles of this Court and the course of decision, the prior trust must prevail. There was no subsequent acquiescence on the part of any person beneficially interested. There is not the least ground for implicating Mrs. Cock as a consenting party to the transaction, and the children are infants.

MANNING-FORD v. TOLEMAN.

I decide this case on the assumption that the Bank had not their attention called to the circumstances in which the property stood. Whether they had or had not notice of the settlement is, in my view of the case, immaterial.

The Vice-Chancellor then asked the plaintiff's counsel whether their client was willing to give up the deeds. \*Upon receiving an answer in the affirmative, his Honour said, that, upon the plaintiff giving an undertaking to that effect, the bill should be dismissed without costs.

[ \*675 ]

The plaintiff undertaking to deliver up the deeds and the memorandum to the trustees within a week, let the bill be dismissed without costs; the costs of the defendants the trustees to be taxed as between solicitor and client; and let the costs of the trustees, and of Mrs. Cock and her children, be paid out of the *corpus* of the settled property.

# DAVY v. GRONOW.

(14 L. J. Ch. 134.)

A receiver who had been appointed by reason of the executors having refused to act under a testator's will, quitted his place of residence in the vicinity of the estates in respect of which he had been appointed receiver. The Court, on the consent of the other parties to the cause, and the executors expressing their willingness to act, made an order to that effect, and that the receiver should pass his accounts.

1845. Jan. 11.

Rolls Court.
Lord
LANGDALE,
M.R.
[ 134 ]

MR. FREELING moved to discharge a receiver, on the ground of his having quitted his place of residence, in South Wales, where the testator's property was situate, and gone to live in London. His appointment was occasioned by the refusal, at the time, of the executors to act under the testator's will; they now, however, were willing to act, and the question was, whether the Court would direct a reference to the Master to appoint a new receiver, or make an order for the executors to act.

The Master of the Rolls, on the consent of the other parties to the cause, made an order for the executors to act, and that the receiver should pass his accounts.

1845. March 14.

SHADWELL, V.-C. [ 222 ]

## SAMUEL v. SAMUEL.

(14 L. J. Ch. 222-223; S. C. 9 Jur. 222.)

A testator directed his property to be divided between his children at twenty-five, share and share alike, and all monies inherited by his daughters to be placed in the hands of trustees, to be settled on them for the sole use of themselves and their lawful issue: Held, that "strict settlement" was not intended by these words, but the money inherited was to be settled upon the daughters and their lawful issue, which would have the effect of giving to the daughters an absolute interest.

This was the petition of Margaret Phillips, one of the daughters of Alfred Phillips, deceased, who made his will, dated the 10th of June, 1835, and thereby appointed Philip Samuel and Denis Moses Samuel his executors, and guardians of his children, until they should attain the age of twenty-five years; and the said testator directed all his property, of whatsoever kind he might be possessed of, to be equally divided among his four children, share and share alike; and the testator thereby gave his executors unlimited power and controul over the management of such property, and he desired that his daughters should not marry during their minority, without the consent of their guardians, and the testator authorized them to give to each of his daughters, on the day of marriage, such sum of money as dowry as they should think fit; and in case that either of his daughters should marry without the consent of her guardians, before she attained the age of twenty-five years, she should only be entitled to one-half or moiety of her quarter share of his estate; and he also directed that all monies inherited by his daughters under his will should be placed in the hands of trustees, appointed by their guardians, to be settled on them for the sole use of themselves and their lawful issue.

A suit was instituted for the administration of the estate of the said testator, Alfred Phillips, and under an order made in the suit, the share belonging to the petitioner was directed to be carried over to the account of Margaret Phillips, and the other parties who might be interested therein. The petitioner having attained the age of twenty-five years presented this petition, praying that she might be declared entitled to the said share so standing to her account in the cause, for her own use and benefit absolutely; or, if the Court should be of opinion that she was not entitled thereto, but that under the will of the said Alfred Phillips a settlement ought to be made thereof, that then it might be referred to the Master to approve of a proper settlement of \*such sum, for the benefit of the petitioner and the other parties on whom the same ought to be settled.

SAMUEL

SAMUEL.

Mr. Swanston, Mr. Cooper and Mr. Tripp, for the petitioner, contended, that under the words of the testator's will, the petitioner took an absolute interest in her fourth part of the fund, and that there was no necessity for a settlement being made. The case would be different if the testator had given his daughter a life interest for her sole and separate use. In order to deprive the petitioner of the absolute interest, the word "issue" must be taken to mean children; but there was nothing in the will to lead to that conclusion. The word "settled" was not sufficient to prove that the testator intended to give other than an absolute interest in the property; and that this being the case of a will, and not of articles for a settlement, the Court would consider the intention, and that alone; and there was nothing in this case to show any intention to cut down the effect of the word "issue," which must therefore be held a word of limitation, and not of purchase.

Jervoise v. The Duke of Northumberland (1), Stonor v. Curwen (2), Tullett v. Armstrong (3), Sweetapple v. Bindon (4).

Mr. Simpson appeared for one of the children, who had not attained the age of twenty-five.

Mr. Gordon, for the trustees, submitted whether the testator did not intend that the property should be settled upon his daughter in the ordinary terms of a strict settlement.

#### THE VICE-CHANCELLOR:

This is a petition by Margaret only as respects her share in the fund: the question must be decided on the mere words of the will. The testator has directed that all monies inherited by his daughters under his will should be placed in the hands of trustees appointed by their guardians, to be settled on them for the sole use of themselves and their lawful issue. I shall, therefore, in the words of the will, direct that the petitioner's share shall be settled upon her and her lawful issue, which will, in fact, be the same as giving it to her absolutely.

<sup>(1) 21</sup> R. R. 229 (1 Jac. & W. 559).

<sup>(3) 49</sup> R. R. 280 (4 My. & Cr. 377).

<sup>(2) 35</sup> R. R. 156 (5 Sim. 264).

<sup>(4) 2</sup> Vern. 536.

1845. *April* 11.

WIGRAM, V.-C. [ 837 ]

# OGLE v. CORTHORN.

(14 L. J. Ch. 337-338; S. C. 9 Jur. 325.)

The testator, by his will, gave to his niece, E. G., wife of Captain G., the sum of 7,000l., and to her heirs, for her separate use; the sum of 7,000l. to be invested in Consols, in the names of A. and B., who were appointed trustees of the donation, to receive the interest of the stock, and to be answerable for the stock, for the use of E. G. and her children, and to apply it most conducive to their interest. E. G. to pay her mother during her life the sum of 40l. per annum: Held, that E. G. was entitled for life, with remainder to her children born at and after the death of the testator.

W. A. Cave, by his will, dated the 24th of June, 1834, gave all his property, real and personal, to his wife, Dorothy Cave, subject to certain legacies which were to be paid after her decease, she to have the interest of such legacies during her life. The testator then gave several legacies by his will, amongst which was the following: "I give to my great-niece Emma Griffiths, wife of Captain Griffiths. of &c., the sum of 7,000l., and to her heirs, free from the power of her husband. This 7,000l, to be invested in the 3l, per cent. Consols, in the name of Charles Corthorn, of &c., and in the name of J. B. Burrell, of &c., who are appointed trustees of this donation, to receive the interest of the stock, and to be answerable for the stock. for the use of Emma Griffiths and her children, and to apply it most conducive to their interest. Emma Griffiths is to pay her mother during her life the sum of 40l. per annum, viz. Mrs. Scott." On the death of the testator's widow, in July, 1843, a bill was filed by some of the residuary legatees for the administration of the testator's estate; and one of the questions raised in the suit was, as to what interest Mrs. Griffiths and her children took in the bequest Mrs. Griffiths had several children, some born before of 7,000l. the testator's death and some afterwards.

Mr. Wood and Mr. Bird, for the plaintiffs.

Mr. K. Parker and Mr. Hardy, for Captain and Mrs. Griffiths, contended, that the wife took for life, with remainder to her children; that, though the words of the bequest taken per se would seem to imply a joint interest in the mother and her children living at the testator's death, yet the subsequent directions, that the trustees should be answerable for the stock, and that Mrs. Griffiths should pay an annuity to her mother, raised the inference that the construction contended for would best carry out the intentions of the testator, and would be most provident for the family.

Morse v. Morse (1), Vaughan v. The Marquis of Headfort (2), French v. French (3), Chambers v. Atkins (4).

OGLE V. Corthorn.

Mr. Phillipps, for the children of Mrs. Griffiths born after the testator's death, in the same interest.

Mr. Wetherell, for Emma and Ellen Griffiths, the children of Mrs. Griffiths, born in the lifetime of the testator, contended, that the mother and these two children were absolutely entitled to the fund as joint tenants.

De Witte v. De Witte (5), Sutton v. Torre (6).

#### THE VICE-CHANCELLOR:

The language of this will is most vague and uncertain. But there is in this will what the Vice-Chancellor of England, in one of the cases cited, considered material to the interpretation, namely, a clause to the separate use of the mother. If the whole of the dividends, &c. are given to the separate use of the mother, that seems to be conclusive against the children participating with her so long as she should live. The 7,000l. are to be invested; and there is a reason for that investment, which does not occur in the case of Vaughan v. The Marquis of Headfort, namely, that the legatee is a married woman; and the trustees are to receive the interest of the stock, and to be answerable for the stock, for the use of Emma Griffiths and her children. Therefore there is a continuing trust, which is another reason relied on in the cases. I cannot say that these reasons are perfectly satisfactory; but there is a strong probability \*that such a decision will best carry out the actual intentions of the testator. The legacy, therefore, must be carried over to a separate account to the use of the married woman for life. with liberty to the parties to apply.

[ \*338 ]

(5) 54 R. R. 325 (11 Sim. 41).

<sup>(1) 29</sup> R. R. 147 (2 Sim. 485).

<sup>(4) 24</sup> R. R. 196 (1 Sim. & St. 382).

<sup>(2) 51</sup> R. R. 330 (10 Sim. 639).

<sup>(3) 54</sup> R. R. 368 (11 Sim. 257). (6) 59 R. R. 614 (11 L. J. Ch. 255).

1842. July 15.

# BAILLIE v. INNES.

(14 L. J. Ch. 341-344.)

SHADWELL, V.-C. On Appeal. 1843. Dec. 14, 15. 1844. Jan. 16, 17. 1845. May 7. Lord

LYNDHURST, L.C.

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A., the trustee of an estate in the West Indies, acted also as the consignee of it in London, and likewise as the private agent and banker of B., the tenant for life of the estate, with an understanding that B. was not to be personally responsible for any advances made for the estate. A. advanced considerable sums for the benefit of the estate, and became indebted in a large amount to B. personally, and afterwards became bankrupt. Upon a bill filed by B. to have A. removed from the trusteeship, and to have a reconveyance of the estate: Held, that A. was entitled to be repaid his advances before he executed a reconveyance, and that B. had no right of set-off, on account of the debt due to him personally from A.

Under the will of Mr. James Baillie, dated in August, 1793, his eldest son, the first-named plaintiff, Alexander Baillie, was entitled for his life to an estate in the island of Grenada, called the Bacolet estate: and the testator devised and bequeathed other estates and property to trustees, upon trust to sell; and he directed payment of several sums to be made out of the proceeds, including an annuity to his wife, and legacies of 10,000l. to each of his five younger children; and he charged these sums on his Bacolet estate, in case the other property should be insufficient to pay them.

In 1812, an arrangement was made, by which the legacy given to one of the testator's daughters was paid; and as a security for the payment of the legacies to the other children, Alexander Baillie conveyed his life interest in the Bacolet estate to Nathaniel Winter and John Innes, upon trust, out of the rents and profits to keep down the annuity to the testator's widow, and the interest on the legacies, and to apply the surplus for fourteen years towards the payment of the legacies to the four children, and, at the expiration of the fourteen years, in trust for Alexander Baillie.

Previously to the date of this indenture, Mr. Winter had acted in London as the consignee and general agent for the Bacolet estate, and also as the banker of the plaintiff, Alexander Baillie, and had numerous transactions with him in respect of matters which were quite unconnected with the Bacolet estate. In 1812, the defendant Innes entered into partnership with Mr. Winter, and they continued to act in the same manner with regard to the Bacolet estate and Mr. Baillie, the plaintiff, till the death of Mr. Winter in 1824; and after that time, Mr. Innes alone continued the same connexion with the Bacolet estate and with Mr. Baillie till 1833, when Innes became bankrupt.

This bill was filed by Alexander Baillie and the parties entitled in

remainder expectant on his decease without issue, and prayed that Innes might be removed from acting as a trustee under the indenture of July, 1812, and that he might execute all proper conveyances of the trust property and pay what was due from him as trustee.

BAILLIE v. INNES.

The defendant, Mr. Innes, insisted that a large sum was due to him for advances made in respect of the Bacolet estate, and that he was entitled to have those advances repaid before he executed a reconveyance of the trust estates. The plaintiff, on the other hand, claimed a still larger sum due to him from Innes, and insisted on his right to set off this claim against the monies due to Innes from the Bacolet estate.

[ \*342 ]

In December, 1824, the plaintiff, Mr. Baillie, wrote a letter to Mr. Innes, in which was the following passage:

"Mr. Winter's death makes it necessary that I should write to you upon a point relating to Bacolet. It was perfectly well understood between him and me that my account with Nathaniel Winter & Co. was entirely private, and totally unconnected with the account of the Bacolet, and that the Bacolet estate was alone responsible to N. Winter & Co., for the repayment of any advances they might make to it. The same understanding must exist between us at present; for I shall continue to act upon the same principle as formerly, and will not consider myself personally, nor my funds in your hands, liable in any way to you for the advances you may think proper to come under to the Bacolet."

Mr. Innes's reply contained the following passage:

"Both Mr. Winter and myself fully understand that you were not personally responsible for one shilling of our advances on account of Bacolet. I, of course, consider that I have no claim on you for the past, or any future advances."

Correspondence to the same effect had previously taken place between Mr. Baillie and Mr. Winter.

The question in the suit was, whether Mr. Baillie was entitled to set off the money due to him from Mr. Innes against the claim of Mr. Innes on account of his advances for the Bacolet estate.

The manner in which the question was raised appears from the judgment of the Lord Chancellor.

The case was first heard before the Vice-Chancellor of England.

Mr. Bethell and Mr. Wood appeared for the plaintiff.

Mr. Russell, Mr. R. Palmer, Mr. Twiss and Mr. James Parker, contrà.

BAILLIE c. Innes. THE VICE-CHANCELLOR:

I thought that the very argument Mr. Bethell used for the purpose of supporting his case, was an argument that destroyed it. Mr. Bethell said what was perfectly true, that if Mr. Baillie applied to the gentlemen on the other side to have his estate back, they would naturally say, "No, you shall not have the estate back, unless you pay what we have laid out upon it." But this is quite a different case; because, if he asks equity, he must do equity. And if any balance was due to them, they, having been taught to look to the estate for payment, of course would not be bound to take the estate back, unless he did pay. But it appears to me that the two letters that were written conclude the point, and that those two gentlemen who were trustees took it expressly upon the ground that they were to look to the estate alone for payment. Therefore my opinion is, that the Master is right.

The plaintiff appealed from his Honour's decision, and the case was re-argued before the Lord Chancellor, by the same counsel.

1845. May 7. THE LORD CHANCELLOR (after stating the facts of the case):

About the year 1832 or 1833, some years after the death of Mr. Winter, a bill was filed, by persons interested in Mr. Winter's estate, for an account of that estate, and also for an account of all the transactions of the partnership. Mr. Baillie was a party to that suit. He made a claim to a very large debt due to him from the estate, and ultimately that debt was liquidated, at the sum, I think, of about 45,000l., and the amount was paid out of the partnership assets of Messrs. Winter and Innes. There were some claims which he made, which were afterwards withdrawn, amounting to something more than 10,000l. There was a particular claim of about 5.000l., which was disallowed; and those claims which were so disallowed and withdrawn, he afterwards preferred against Mr. Innes individually. This bill was filed by Mr. Baillie, the plaintiff, for the purpose of removing Mr. Innes from the trust, on account of his insolvency, and also for the purpose of taking an account with respect to several transactions, particularly as to the account between him and Mr. Innes, and the account between Mr. Innes and the Bacolet estate. These accounts were referred to the Master, and the Master found, with respect to the claim of the plaintiff against Mr. Innes, that, including interest up to the time when the account was taken, there was a sum due from Mr. Innes

individually to the plaintiff, to the \*extent of 11,880 and odd pounds. With respect to the accounts on the estate, that was settled by agreement between the parties, at a sum of 8,000l.; and another question was referred to the Master, which was, that in taking these accounts he was to have regard to any question of set-off or lien which might exist between the parties; and the question with respect to the set-off or lien that was before the Master, was of this nature: whether the plaintiff was entitled (Mr. Innes being bankrupt) to apply the debt that was due to him in discharge of the sum which Mr. Innes claimed against the The Master, after considering the case, was of Bacolet estate. opinion that there was no right of set-off or lien in that respect, and exceptions were taken to that part of the Master's report. It afterwards came on before the Vice-Chancellor of England; and the Vice-Chancellor of England was of opinion that the Master was right, and he overruled the exceptions: and then, with respect to the decree, he considered the decree as a direct consequence of the overruling of the exceptions; and the decree declared that the sum of 8,000l., and its accumulations, which had been set apart for the purpose of this question, was the property of the assignees, as between the present plaintiff and the assignees; but that was to be without prejudice to any claim between Mr. Innes and the partnership, or Messrs. Winter and Innes's estate.

The sole question, therefore, at present before me, as I understand it, is, whether that lien, or set-off, or equitable claim, exists on the part of Mr. Baillie, the plaintiff. Now, in order to determine that, we must look at what the agreement was between the parties. There was a distinct agreement between the parties, that with respect to the money advanced in respect of the Bacolet estate, by Mr. Innes, he should have no claim whatever personally against the plaintiff, Mr. Baillie; and he was to have no claim whatever against That was the distinct agreement and the funds of Mr. Baillie. understanding between the parties. If, therefore, at any period, Mr. Baillie had brought an action for the purpose of recovering from Mr. Innes the money which Mr. Innes owed him, it is quite clear on his part Mr. Innes could not have set up, by way of set-off, his claim against the Bacolet estate. There was no mutuality with respect There was no debt due from Mr. Baillie to Mr. Innes; there was a debt due from Mr. Innes to Mr. Baillie, but no debt due from Mr. Baillie to Mr. Innes, on the other side. It appears to me, therefore, clear, as far as relates to the question of set-off in this case.

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[ \*343 ]

BAILLIE c. INNES. The next question is, whether there was anything in the nature of mutual credit. I think there was no mutual credit between the parties. Mr. Baillie, the plaintiff, trusts Mr. Innes,—gives credit to Mr. Innes; but Mr. Innes on his side gives no credit whatever to Mr. Baillie; he looked to the estate, and the estate only; and, as there was no mutuality of debt, there is not, also, any mutuality of credit, according to my opinion and my view of the case.

Then the question is, whether there is any equity of any other description entitling Mr. Baillie, the plaintiff, to apply the debt which is due to him, under the present circumstances, in discharge of any claim of Mr. Innes, as against the estate. Now, for my own part, I cannot discover any foundation for such an equity. If the estate had declined in value, which it might have done from many circumstances, it is quite clear on his side that Mr. Innes would have had no claim against Mr. Baillie, to make good that loss: and I see no reason why, on the other side, the debt being diminished in value, in consequence of the bankruptcy of Mr. Innes, why he, Mr. Baillie, on his side should have a right to apply his debt for the purpose of liquidating the demand of Mr. It appears to me, considering the nature of the agreement between them, that the transactions were to be entirely distinct from each other, not giving rise to any inquiry either one way or the other. I think that the decision of the Vice-Chancellor OF ENGLAND is right, and that he did right in overruling the exceptions, and that the order in that respect must be affirmed.

It appears to me the direct consequence of that is, that, as between these parties, this fund which has been set apart as a contingent fund, in favour of the assignees of Mr. Innes, belongs to the assignees, but without prejudice to any question as between Mr. Innes's estate and the estate of Mr. Winter. \*I believe there was some error-whether it was an irregularity or not, in drawing up the decree, I do not know-there was some error, because this debt was stated to be a partnership debt. An application was made to the Vice-Chancellor of England to set that right, which was objected to by Mr. Bethell, and the Vice-Chancellor of England said that he could not do that, unless the cause was reheard. I apprehend it is a clear mistake; that debt was not a debt due from Mr. Innes. the surviving partner, but was a debt personally due from Mr. Innes to the plaintiff, Mr. Baillie, and in that respect the decree must be set right. As far as relates to the first part of the case, therefore, the order of the Vice-Chancellor must be affirmed, with costs.

[ \*344 ]

# IN THE QUEEN'S BENCH.

# BRANSCOMBE v. SCARBROUGH.

SAME v. HEATH.

(6 Q. B. 13-15; S. C. 13 L. J. Q. B. 247; 8 Jur. 688.)

1844. May 24.

Replevin bonds are not an exception to the rule that, on a bond, the plaintiff cannot recover more than the penalty and costs of suit on the bond.

Therefore proceedings in such suit may be stayed on payment of the penalty and costs, though the plaintiff's costs in the replevin suit much exceed the penalty.

A Judge at chambers may order the stay of proceedings.

THE plaintiff in these actions was the defendant in an action of replevin: Wheeler v. Branscombe (1). The cause was tried, and a verdict found for the plaintiff, but leave reserved to move to enter a verdict for the defendant. A rule to that effect was made absolute in last Michaelmas vacation (1). The defendant in replevin took an assignment of the replevin bond, and commenced the present actions upon it against Scarbrough and Heath, the sureties. His taxed costs in the cause of Wheeler v. Branscombe greatly exceeded the penal sum in the replevin bond, which was only 18l. 1s.

The defendants, Scarbrough and Heath, took out a summons to show cause at chambers "why, upon payment of the penalty of the bond on which these actions are brought, together with costs to be taxed, all further proceedings in these causes should not be stayed." Cause was shown before Patteson, J., who made the order as prayed, giving leave to the plaintiff Branscombe to move this Court that the order might be discharged upon either of the two grounds after stated.

M. Smith now moved for a rule to show cause why the order should not be discharged:

First, the learned Judge had not jurisdiction. Stat. 11 Geo. II. c. 19, s. 23 (2), which makes replevin bonds assignable to the avowant \*or person making cognizance, enacts that, if the bond be forfeited, the assignee may sue thereon, and "the Court where such action shall be brought may by a rule of the same Court give such relief to the parties upon such bond, as may be agreeable to justice and reason." A Judge at chambers is not "the Court" for this purpose.

[ \*14 ]

<sup>(1) 5</sup> Q. B. 373.

<sup>1888 (51 &</sup>amp; 52 Vict. c. 43), ss. 135, 136.

<sup>(2)</sup> Repealed by 44 & 45 Vict. c. 59, —A. C.

s. 3; see now County Courts Act,

Branscombe v. Scarbrough.

[ \*15 ]

(Patteson, J.: The defendants said that they were not seeking relief under the statute, but merely bringing in the penalty of the bond, as a defendant might do in any case. Then the question arose whether they were entitled to a stay of proceedings on merely paying in the penalty with costs of the actions on the bond.)

That is a point which ought not to be summarily decided at chambers. The defendants may raise it by paying the money into Court in the actions. The penalty in a replevin bond is only double the value of the goods distrained; in the present instance it is 18l. 1s., while the costs of the action are 160l. It is laid down in Lord Lonsdale v. Church (1) that the obligee of a bond may recover damages beyond the penalty, that being merely a security. The doctrine in that case was disputed by Lord Kenyon in Wilde v. Clarkson (2); but is supported by the ruling of Littledale, J. in Francis v. Wilson (3).

(Patteson, J.: That was a very peculiar case. The bond was in the penal sum of 120*l*. conditioned for the payment of that sum with interest.)

In an action upon judgment on a bond, interest may be recovered to an amount which makes the whole sum allowed exceed the penalty: M'Clure v. Dunkin (4). In \*equity, the penalty of the bond is not considered a necessary limit: Jeudwine v. Agate (5), Grant v. Grant (6). In Hellen v. Ardley (7), an action on a bond, Lord Tenterden thought that the plaintiff could not have more than the penalty: but he allowed the jury to give a verdict for one shilling beyond, reserving leave to move to increase the damages; and, if a shilling could be recovered beyond the penalty, a larger sum might.

(Coleridge, J.: To succeed in this motion, you must show a distinction between replevin bonds and others. The note (1) on Gainsford v. Griffith (8) lays down the doctrine generally.)

- (1) 1 R. R. 501 (2 T. R. 388).
- (2) 3 R. R. 178 (6 T. R. 303).
- (3) Ry. & M. 105.
- (4) 1 East, 436. See *Ibbotson* v. *Fenton*, 6 Ad. & El. 772, 776.
  - (5) 30 R. R. 136 (3 Sim. 129).
- (6) 27 R. R. 135 (3 Russ. 598; 3 Sim. 340).
  - (7) 3 Car. & P. 12.
- (8) 1 Wms. Saund. 58 b. And see notes (c), (d), ibid. 6th ed.

# LORD DENMAN, Ch. J.:

To grant a rule in this case would be creating a doubt where none really exists. Lord Lonsdale v. Church (1) has been overruled on the point now discussed: and the case before Littledale, J., cannot be considered as reestablishing it. In Hellen v. Ardley (2) it might be wrong to allow a verdict for even the shilling; but the ruling, at all events, did not affect the general doctrine on this subject.

BRANS-COMBE T. SCAR-BROUGH.

# PATTESON, J.:

The one shilling was given there for detention of the debt; and perhaps it was not right to give it.

WILLIAMS and COLERIDGE, JJ. concurred.

Rule refused.

# DAVIS v. HENRY JOHN CLARKE.

(6 Q. B. 16—19; S. C. 13 L. J. Q. B. 305; 8 Jur. 688; 1 Car. & K. 177.)

John Hart drew a bill payable to himself or order, addressed to John Hart; C. wrote across this, "accepted, H. J. C.": Held, that C. could not be sued as acceptor of a bill of exchange directed to him (3).

1844. May 24.

[ 16 ]

Assumpsit. The first count stated that "one John Hart," on 8th March, 1838, "made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to him or his order 100*l.*," value received, at twelve months after date, which had elapsed before the commencement &c.; "and the defendant then accepted the said bill, and the said John Hart then indorsed the same to the plaintiff;" averment of notice to defendant, promise by him to pay plaintiff, and that he did not pay.

There was also a count on an account stated.

The first plea denied the acceptance; the second the promise; the third alleged a discharge of defendant by the Insolvent Debtors' Court.

The replication joined issue on the first two pleas, and traversed the discharge alleged in the third; on which traverse issue was joined.

On the trial, before Parke, B., at the Essex Summer Assizes,

(3) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 17.—A. C.

(2) 3 Car. & P. 12.

<sup>(1) 1</sup> R. R. 501 (2 T. R. 388),

DAVIS v. CLARKE.

[ \*18 ]

1843, a written paper, in the following terms, was given in evidence on behalf of the plaintiff.

"100l. "London, 8th March, 1838.

"Twelve months after date pay to me or my order one hundred pounds, value received.

"To Mr. John Hart.

"JOHN HART."

Across the face of this instrument was written

"Accepted.

"H. J. CLARKE.

"payable at 319, Strand."

[ 17 ] This was proved to be in the defendant's handwriting.

No other evidence being produced, the learned Baron directed a nonsuit. In Michaelmas Term, 1843, *Petersdorff* obtained a rule *nisi* for a new trial.

Sir F. Thesiger, Solicitor-General, now showed cause:

The defendant has not accepted the bill described in the declaration: the instrument produced is indeed no bill of exchange. In Gray v. Milner (1), where the instrument was not addressed to any one, but had only a place of payment added, and in other respects resembled the document here proved, the acceptor was held liable, as having admitted himself, by the acceptance, to be the party pointed out by the place of payment. Here the drawer addresses himself; and the instrument more nearly resembles a promissory note. It may be that the defendant might have been sued as a surety.

# Petersdorff, contrà :

The principle of Gray v. Milner (1) applies. The defendant, by his acceptance, estops himself from disputing his own character and the nature of the instrument. In Polhill v. Walter (2), indeed, it was said that no one could be liable as acceptor, unless he were the person to whom the bill was addressed, or an acceptor for honour. But the question of acceptance in this form was not then distinctly before the Court. Here it may be contended that the defendant identifies himself as the person addressed under the name of John Hart. The Judge at Nisi Prius was requested, but refused, to allow an amendment, by calling \*the instrument a promissory note made by the defendant; the writing the name was

(1) 21 R. R. 525 (8 Taunt. 739). (2) 37 R. R. 344 (3 B. & Ad. 114).

a new making, according to the principle of Penny v. Innes (1). (He referred also to Jackson v. Hudson (2).)

DAVIS v. CLARKE.

### LORD DENMAN, Ch. J.:

There is no authority, either in the English law or the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another. We must take it on this instrument that the defendant is different from the party to whom it is addressed. Polhill v. Walter (3) and Jackson v. Hudson (2) are authorities showing that the defendant here cannot be sued as acceptor. In Jackson v. Hudson (2) Lord Ellenborough treated an acceptance by a party not addressed as "contrary to the usage and custom of merchants."

### PATTESON, J.:

No previous case seems to be exactly like this. In Jackson v. IIudson (2) there was one acceptance by the party to whom the bill was addressed, prior to the acceptance by the defendant. In Gray v. Milner (4) no party was named in the address; and I must say that the decision in that case appears to me to go to the extremity of what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed. But here another person, the drawer himself, is named in the \*address. I do not know that a party may not address a bill to himself, and accept, though the proceeding would be absurd enough. Then it is said that the defendant is estopped: but that cannot be supported where the instrument shows, on its face, that he cannot be the acceptor.

[ \*19 ]

# WILLIAMS, J.:

The only question is, whether the defendant is such an acceptor as is described in the declaration; that is of a bill of exchange directed to him. No doubt this can be so only where he is the drawee; but here the bill is not addressed to the defendant at all. This is therefore not an acceptance within the custom of merchants.

<sup>(1) 40</sup> R. R. 629 (1 Cr. M. & R. 439; S. C. 5 Tyr. 107). See Gwinnell v. Herbert, 44 R. R. 458 (5 Ad. & El. 436).

<sup>(2) 11</sup> R. R. 762 (2 Camp. 447).

<sup>(3) 37</sup> R. B. 344 (3 B. & Ad. 114).

<sup>(4) 21</sup> R. R. 525 (8 Taunt. 739).

CLARKE.

DAVIS COLERIDGE, J.:

The safe course is to adhere to the mercantile rule that an acceptance can be made only by the party addressed, or for his honour. Here the last is not pretended; and the first cannot be presumed. If the John Hart addressed is different from the John Hart who draws, there is still no acceptance; if the same, then the instrument is a promissory note and not a bill of exchange.

Rule discharged.

1844. *May* 25. FAWCETT v. FEARNE AND OTHERS (1).

(6 Q. B. 20--30; S. C. 13 L. J. Q. B. 300; 8 Jur. 645.)

[ 20 ]

Under stat. 6 Geo. IV. c. 16, s. 72, which empowers the commissioners in bankruptcy to dispose of goods being in the possession, order or disposition of the bankrupt as reputed owner "at the time he becomes bankrupt," the time meant is that of committing the act of bankruptcy, not the time when the *fiat* issued; stat. 2 & 3 Vict. c. 29, s. 1, making no alteration in this respect (2).

Semble, the reputed ownership clause does not apply to goods coming into the possession of the bankrupt after the act of bankruptcy.

A trader assigned his effects to a trustee, thereby committing an act of bankruptcy. Afterwards a creditor, ignorant of the act of bankruptcy, took in execution the trader's goods comprised in the assignment. The trustee paid off the execution, and took an assignment of the goods from the sheriff.

A flat in bankruptcy having afterwards issued against the trader,

Held, that, although the levy made by the execution creditor might have been protected (3) by stat. 6 Geo. IV. c. 16, s. 81, or 2 & 3 Vict. c. 29, the party who had become assignee of the sheriff with knowledge of the act of bankruptcy, could not avail himself of that protection, and that the assignees in the bankruptcy might bring trover against him for the goods.

TROVER for cattle, goods and chattels. Pleas. 1. That plaintiff was not nor is possessed &c. 2. Not guilty. Issues thereon.

The cause was tried before Wightman, J., at the York Summer Assizes, 1843. The material facts of the case are fully detailed in the following statement, which forms part of the judgment delivered by the Court on disposing of the aftermentioned rule.

"This was an action of trover against the defendants, who are the assignees of a bankrupt of the name of Bradwell, to recover damages for the conversion of certain cattle, goods and chattels which the defendants had seized, upon the issuing of the *fiat*, as

<sup>(1)</sup> Cited in Ex parte Harris, Re James (1874) L. R. 19 Eq. 255, 44 L. J. Bk. 31.—A. C.

<sup>(2)</sup> See now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.),

and cf. the previous Acts of 1869 (32 & 33 Vict. c. 71, s. 15) and 1849 (12 & 13 Vict. c. 106, s. 125).

<sup>(3)</sup> See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45.

part of the bankrupt's estate, but which the plaintiff claimed as his property.

FAWCETT c. FEARNE

"The plaintiff was uncle to the bankrupt, and a creditor to a considerable amount: and, on the 15th of August, 1842, the bankrupt made an assignment to him and a person of the name of Simpson for the benefit of creditors. This assignment was produced by the defendants, and was the only act of bankruptcy proved in the cause. The fiat was issued on the 25th of January, 1848.

[ 21 ]

"On the 15th of August, 1842, being the same day upon which the act of bankruptcy was committed, but some hours before the assignment was executed, and therefore before the act of bankruptcy, the Sheriff of Yorkshire seized certain of the bankrupt's goods under a f. fu. at the suit of the Low Moor Company, indersed to levy 462l. 12s. and 13l. for costs, upon a hostile judgment obtained by them against Bradwell the bankrupt. On the 17th of August the sheriff assigned the goods seized to the Low Moor Company by bill of sale in satisfaction of their execution; and the plaintiff, having paid to the Low Moor Company the amount for which the goods were assigned to them by the sheriff under their execution, took an assignment from them on the 12th of October of the property seized by the sheriff under their execution. Formal possession was given under both assignments.

"On the 23rd of August, 1842, three other writs of fi. fa., at the suit of bond fide and hostile judgment creditors, were delivered to the sheriff, who, on or about that day, seized certain goods of the bankrupt under them. The amount of these three executions altogether was about 282l.

"On the 15th September these executions were paid off by the plaintiff, who took an assignment from the sheriff of the goods seized under these executions. The plaintiff wished the sheriff to include in the inventory all the goods of the bankrupt not included in the seizure under the execution at the suit of the Low Moor Company, alleging that, as he would pay the creditors 20s. in the pound, it would not signify. This, however, was not done; but goods, which afterwards sold for 584l., were put into the inventory to the assignment under the three \*executions. The sheriff then retired altogether; and Bradwell continued in the apparent ownership of the property down to the 25th of January, when the fiat issued, and had them, as found by the jury, in his possession, order and disposition, with the consent of the plaintiff, down to that time."

[ \*22 ]

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[ \*23 ]

The defendants' counsel relied upon stat. 6 Geo. IV. c. 16, s. 72, contending that the words of that clause, "at the time he becomes bankrupt" (1), refer, not to the time of committing the act of bankruptcy, but to the time of issuing the fiat; and that the goods in this case were, at the latter period, in the possession, order and disposition of the bankrupt, with the consent of the true owner, assuming the plaintiff to have been so. The learned Judge left it to the jury, as the only material question in the case, whether, on the 25th of January, 1843, when the flat issued, Bradwell was the reputed owner of the goods and had them in his possession, order or disposition by the consent of the true owner. The jury were of opinion that he had, and found a verdict for the plaintiff.

In Michaelmas Term, 1843, Hoggins, by leave reserved at the trial, moved for a rule to show cause why the verdict should not be set aside and a nonsuit entered, or a verdict for the defendants, or why the verdict should not be reduced to such sum as the Court should direct. A rule nisi was granted.

Knowles, Joseph Addison and Pashley now showed cause (2):

First, the assignment by Bradwell to the plaintiff was not affected by stat. 6 Geo. IV. c. 16, s. 72, unless the words "when he becomes bankrupt," in that \*clause, refer to the time of issuing the fiat. But this is not the true construction; the trader becomes bankrupt, in the proper sense of the word, when he commits the act of bankruptcy, not when the fiat issues: Smith v. Topping (3). same construction was put upon stat. 21 Jac. I. c. 19, s. 11 (which does not materially differ from this clause) in Lyon v. Weldon (4) and Jones v. Dwyer (5). Stat. 2 & 3 Vict. c. 29, s. 1, does not alter the operation of stat. 6 Geo. IV. c. 16, s. 72, though some expressions in Whitmore v. Robertson (6) may seem to imply that it It is there said that the effect of the later statute "seems to be, in the case of bona fide contracts, and dealings, and executions, to do away with the relation to the act of bankruptcy, and substitute the issuing of the fiat for the act of bankruptcy, as the time at which the right of the assignees is to accrue." But that dictum

(1) See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.), where the words used are "at the commencement of the bankruptcy." This form of words first appears in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15. For the date of the commencement of the bankruptcy see now s. 44

of the Bankruptcy Act, 1883.-A. C.

- (2) Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.
  - (3) 39 R. R. 616 (5 B. & Ad. 674).
  - (4) 2 Bing. 334.
  - (5) 15 East, 21.
  - (6) 8 M. & W. 463, 476.

must be taken as referring to the particular subject-matter then before the Court, and to the bearing of the new Act upon sect. 108 of stat. 6 Geo. IV. c. 16. The Act of Victoria does not notice sect. 72 of the former statute, and cannot have been meant to annul it by mere implication. If this view of the statutes be correct the verdict is right, no part of the property having been in Bradwell's possession when he became bankrupt, "by the consent and permission of the true owner," because none of the goods then in his possession had any true owner but himself.

Secondly, if Bradwell's assignment to the plaintiff is invalid as having been made after Bradwell became bankrupt, the plaintiff may still claim under the assignments made to him by the Low Moor Company on the \*12th of October, and from the sheriff on the 15th of September; for the executions under which the assigned property had been taken were valid, not only under stat. 2 & 3 Vict. c. 29, but also under stat. 6 Geo. IV. c. 16, s. 81, both executions being carried into effect more than two calendar months before the issuing of the fiat, and by persons who, at the time of levying, had no notice of any prior act of bankruptcy. The plaintiff had such notice; but that does not affect his title derived from parties who had none. If it be alleged that the sheriff had notice, that, if true, does not affect the execution creditor; the sheriff is not his agent for the purpose of receiving The plaintiff's case such notice: Ramsey v. Eaton (1). unquestionable under the first execution, which was prior to the alleged act of bankruptcy; and, on account, probably, of that distinction, an alternative proposed in the rule is, to reduce the damages. But the plaintiff's title is good under both executions.

Dundas, W. H. Watson and Hoggins, contrà:

Stat. 6 Geo. IV. c. 16, s. 72, applies to this case, the goods having remained in the possession, order and disposition of the bankrupt from the 15th of August down to the issuing of the flat.

(Patteson, J.: The jury find only that they were so at the time when the *fiat* issued.)

It would be a very inconvenient construction of sect. 72 if a party might enjoy a false credit for several months by the possession of goods, and, when a *fiat* issued, refer to the commencement of that time as the period when he became bankrupt.

(1) 10 M. & W. 22.

[ \*24 ]

FAWCETT 4.

(Patteson, J.: The opposite construction, too, may be attended with great inconvenience.)

[ •25 ] V

[ \*26 ]

[ 27 ]

It is not to be assumed here that the assignment to the \*plaintiff was the act of bankruptcy on which the flat proceeded: the defendants were not called upon to prove any, no notice having been given of an intention to dispute it; and it might therefore be taken that the act of bankruptcy immediately preceded the fiat. But it is \*unnecessary to make this supposition, because, whatever may formerly have been considered the time of becoming bankrupt with reference to the question of reputed ownership, the statute 2 & 3 Vict. c. 29, s. 1, now identifies that time with the time of issuing the fiat. Whitmore v. Robertson (1) shows how that statute operates upon the construction of sect. 108 of stat. 6 Geo. IV. c. 16; and the judgment in Re Styan (2) must have proceeded on the ground that sect. 72 also is affected by the statute of Victoria. Notice to an insurance Company of the pledge and deposit of a policy was there held to prevent its passing to the assignees, the notice having been given after an act of bankruptcy,

(Patteson, J. referred to Ex parte Rose (3) and Ex parte Smith (4).)

but before the fiat. Such notice could have been necessary only to bar the operation of sect. 72: it clearly was not needed to

complete the title of the party receiving the pledge.

In Skey v. Carter (5), as in Whitmore v. Robertson (1), it was held that, since the statute of Victoria, the words "before the bank-ruptcy," in stat. 6 Geo. IV. c. 16, s. 108, must be referred to the time of issuing the fiat.

The plaintiff cannot claim under the execution creditors by the assignments of September 15th and October 12th. He takes by the assignment for the benefit of creditors, made on the 15th of August. Having executed that assignment, he is estopped from saying that it is fraudulent and a nullity. \* \* The plaintiff has taken successive assignments of the same property: but he cannot affirm that the first was inoperative: and, if so, the seizures, on which the other assignments depend, cannot avail him.

Cur. adv. rult,

<sup>(1) 8</sup> M. & W. 463.

<sup>(4) 2</sup> Mont. D. & D. 213,

<sup>(2) 2</sup> Mont. Deac. & De Gex, 219,

<sup>(5) 11</sup> M, & W. 571,

<sup>(3) 2</sup> Mont. D. & D. 131,

LORD DENMAN, Ch. J., in the vacation following this Term (June 27th), delivered the judgment of the Court. \*After stating the facts as they are set out, p. 258, ante, his Lordship proceeded: FAWCETT FEARNE. [ \*28 ]

For the defendants it was contended that the words in the seventysecond section of the Bankrupt Act, "at the time he becomes bankrupt," have reference to the time of the fiat, and not to the time of the act of bankruptcy, and that they were entitled to all the goods in question as being in the reputed ownership of the bankrupt with the consent of the plaintiff at the time of the fiat, it being admitted that, if the time be referable to the act of bankruptcy, they would not be entitled under that section.

We are, however, of opinion that the words "at the time he becomes bankrupt" have reference to the act of bankruptcy, and not to the time of the commission or flat. This was indeed expressly so decided in Lyon v. Weldon (1) and Smith v. Topping (2); and we see no sufficient ground for putting a different construction on those words from that which they have uniformly received.

It was then contended by the assignees that the plaintiff never did acquire any property in the goods, for that he took them by assignment from the sheriff after an act of bankruptcy by Bradwell, of which the plaintiff was fully cognizant, and that, as against him, the property in the goods was by relation vested in the defendants at the time of the assignments by the sheriff.

The statutes which render dealings with persons who afterwards become bankrupt valid notwithstanding previous acts of bankruptcy do not protect or assist those who are cognizant of such previous acts of bankruptcy: \*as against them the title of the assignees by relation to the time of the act of bankruptcy is available.

[ \*29 ]

In the present case the defendants, the assignees, would be entitled to defeat the execution of any judgment creditor who had knowledge of the act of bankruptcy of the 15th of August, if the seizure under his writ was after the making the assignment on that day, but not if it was made before; for, if a seizure be made under an execution (in a case not within the 108th section of the Bankrupt Act) before the act of bankruptcy, it may be completed The seizure under the execution at the suit of the Low Moor Company was made before the act of bankruptcy, and the seizures under the three other executions were made after the

-A. C.

<sup>(1) 2</sup> Bing. 334.

Act, 1883 (46 & 47 Vict. c. 52), s. 45.

<sup>(2) 39</sup> R. R. 616 (5 B. & Ad. 674).

<sup>(3)</sup> See now, however, Bankruptcy

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[ \*30 ]

act of bankruptcy. None of the execution creditors were shown to have had any notice of the act of bankruptcy of the 15th of August; but, if they had, the executions only of those in which the seizure was after the 15th of August could have been defeated by the defendants. That at the suit of the Low Moor Company would still have been available, as the seizure was before the act of bankruptcy. The plaintiff, who became assignee of the sheriff under all the executions, being aware of the act of bankruptcy of the 15th of August, knew that, if a flat issued, the assignees would have a title by relation, and that he was taking an assignment of goods as being the goods of the bankrupt which might turn out, as far as respects the goods taken under the three last executions, to have been the goods of the assignees at the time of the seizure. issued: and, though the execution creditors themselves, who knew nothing of the act of bankruptcy, nor that the goods might by relation be the property of any \*other persons than the bankrupt, might be protected, the plaintiff, who became the assignee of the sheriff with full knowledge of the act of bankruptcy, is not; and we are of opinion that the defendants are entitled to retain all the goods, or the value of all the goods, which were assigned to the plaintiff under the three last executions; indeed to all the goods except so much as were assigned under the Low Moor execution, and were sufficient to satisfy that.

It appears to us that the plaintiff ought not to be in a worse situation than he would have been in had the Low Moor Company themselves been aware of the act of bankruptcy of the 15th of August; and, as the seizure was before the act of bankruptcy, they might have completed the execution though having knowledge of that act of bankruptcy.

We are therefore of opinion that the verdict for the plaintiff should stand for the amount found to be the value of so much of the goods as were sufficient to satisfy the Low Moor Company's execution (1), and for that amount only.

Verdict to be reduced accordingly.

(1) See Ex parte Harris, Re James (1874) L. R. 19 Eq. 255, 44 L. J. Bk. 31.—A. C.

# LOCKWOOD v. WOOD.

(6 Q. B. 31-49; S. C. 10 L. J. Q. B. 100; 5 Jur. 626.)

1841. Feb. 4.

[ 31 ]

The word "toll" in a grant may include stallage.

And, if the Crown grant to H. and his heirs that they may have and hold a market in the town of E., with all tolls and profits thence arising, but neither the Crown nor H. has any right of soil in the town, if H. afterwards acquires the soil on which the market is held, he may claim stallage by virtue of the grant.

So held by the Court of Q. B. Judgment affirmed by the Court of Exchequer Chamber.

Held by the Court of Exchequer Chamber, that a modern grant by H. a subject, holding under the Crown as before mentioned, to which certain persons, styled "Inhabitants of E.," are parties, granting that the said "Inhabitants of E.," their heirs and assigns for ever, shall enjoy the market as freely as H. held it of the Crown, and containing a covenant by H. that they shall do so, does not exempt from stallage an inhabitant not privy to the parties to such grant.

Such an exemption for the inhabitants of a town, can be only by way of custom, not of grant or prescription.

Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally, quære.

Deet, for stallage duties and moneys due from and of right payable by defendant to plaintiff as the proprietor of a certain ancient market and market place, with the appurtenances, situate in the county of York, and of the stallage and other profits, privileges and emoluments thereto belonging and accruing therefrom, for and in respect of defendant having erected, put, placed and kept in the said market, and in and upon the market place of plaintiff, certain stalls, stands, caravans and carriages for the purpose of putting and placing and exposing to sale divers goods and chattels therein and thereon; and for and in respect of defendant having put and placed and exposed to sale therein and thereon divers goods and chattels to be sold in the said market and market place on divers days whereon the said market was held; and for and in respect of defendant having brought into the said market and exposed to sale therein divers other goods and chattels. Count on an account stated. Plea: Never indebted. Issue thereon.

On the trial, before Parke, B., at the York Spring Assizes, 1839, the plaintiff gave in evidence letters patent of King Charles I., dated 6th August, 15 Car. I. (1639), which, after reciting a previous inquisition on writ of ad \*quod damnum, proceeded as follows (1). Know ye that we, at the humble petition of our beloved the aforesaid George Hall, of our special grace &c., have given and granted

(1) The original was in Latin. The above extract is from a translation used in the cause.

[ \*32 ]

Lockwood e. Wood.

[ \*33 ]

power, and, for ourselves, our heirs and successors, we do give and grant power, to the said George Hall, his heirs and assigns, that he and they in all time coming every year may have and hold, and may be able to have and hold, at the town of Easingwold in the county of York, one market on Friday each week; also two fairs or markets in the same place, one of which &c. (stating the days on which they were to be held) yearly: likewise another market for cattle on Friday every other week, to be begun &c., and until, &c. (limiting the duration to a certain part of the year), to be held yearly for ever (1); with a court of pie-powder to be held at the time of the said fairs or markets, and with all tolls and profits thence arising and proceeding. And that the said George Hall and his heirs for ever may have, and may be able to enjoy, such and so great the same and similar a reasonable toll and profit in the market and fairs or markets aforesaid as are lawfully held and enjoyed in our town of Thirsk in the county aforesaid, for the tolls and profits of the markets and fairs and markets in the aforesaid town of Thirsk to be held, so however that the aforesaid markets and fairs \*or markets may not be to our loss or that of other neighbouring markets or fairs. Wherefore we will, and by these presents, for ourselves, our heirs and successors, we enjoin and command, that the aforesaid George Hall, his heirs and assigns. the aforesaid markets and fairs or markets at the aforesaid town fully and entirely on the feasts and days abovesaid, as it is observed annually, that they may have and hold, and may be able to have and hold for ever, along with all and every kind of toll and profit aforesaid thence proceeding and arising, and this without any molestation &c. of us, our heirs and successors, &c.

The other material points in the evidence for the plaintiff were stated as follows in the judgment of the Court of Queen's Bench on the motion for a new trial.

"At the time of this grant the manor of Easingwold was not in the Crown. It did not appear that George Hall, the grantee, was lord of the manor, or was seised or possessed of any land in Easingwold

(1) "Cum curià pedis pulverizati, tempore earundem feriarum sive nundinarum tenendà, ac cum omnibus tolnetis et proficuis inde provenientibus et emergentibus. Et quod ipse Georgius Hall et hæredes sui in perpetuum habeant et gaudere possint tot, tanta et talia hujusmodi eadem et consimilia rationabilia tolneta et

proficua in mercatis, feriis sive nundinis prædictis, quot, quanta et qualia legitimè habentur et percipiuntur in villà nostrà de Thirske in comitatu prædicto, pro tolnetis et proficuis mercatorum, feriarum et nundinarum in prædictà villà de Thirske tenendarum. Ita tamen quòd" &c. in which the market could be held. The plaintiff gave in evidence several conveyances of the market and fairs in Easingwold, and of places connected with the market, commencing in 1757, down to 1838, when they became vested in the plaintiff. In several of these conveyances the market place was distinctly named. The plaintiff proved, by evidence of living witnesses of early date, the perception of market tolls and also of stallage. It appeared from the evidence that the Easingwold people did not pay the common market toll: some evidence was given as to their not paying stallage: yet there was not perhaps sufficient evidence from that alone to infer an exemption from stallage."

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The defendant's case was that he, as an inhabitant of \*Easingwold, was exempt from stallage: and, to prove this, he gave in evidence a deed, bearing date 31st August, 1646, between George Hall, the grantee above-mentioned, of the one part, and William Marshall and others of the other part. The deed was as follows:

[ \*34 ]

"This indenture, made the last day of August, A.D. 1646, and in the two-and-twentieth year," &c. (22 Car. I.), "between George Hall of Simington, in the county of York, gent., on the one part, and William Marshall, Richard Reynolds the younger, John Lindesley the younger, and John Cowpland, all of Easingwold in the said county of York, yeomen, and bylawmen for this present year 1646 for the said town of Easingwold, on the behalf of themselves and all the inhabitants of Easingwold aforesaid mentioned in a schedule hereunto annexed, by and with the consent and appointment of all the said inhabitants of Easingwold aforesaid on the other part, witnesseth that, whereas the said G. Hall did heretofore purchase of the King's Majesty that now is one market on the Friday in Easingwold aforesaid in every week, and two fairs there, whereof one of them to be holden" &c. (naming the days), "yearly and every year; and also one other market for cattle on Friday in every other week, to be holden" &c. (naming the times); "together with a court of pie-powder: As in and by his Highness's letters patents, under the broad seal of England, bearing date at Cornbury the 6th day of August" &c. (15 Car. I.), "more plainly and at large it doth and may appear: Now these presents further witness that the said W. Marshall, R. R., J. L. and J. C., and the said inhabitants of Easingwold aforesaid, having taken into their consideration the great charge that the said G. Hall hath been at in procuring the \*said market, and the great benefit it is like to bring to the inhabitants and their heirs in the said town of Easingwold in time

[ \*35 ]

to come, they have requested the said G. Hall that he will, at his

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[ \*36 ]

further charge, build a fair toll booth or town house there to be maintained at the charge of him the said G. Hall, his heirs and assigns for ever, wherein the inhabitants and their heirs and assigns for ever may have their Courts and bylaws and other meetings kept, without the let, contradiction or molestation of him the said G. Hall, his heirs or assigns, and also that the said G. Hall shall grant to the said inhabitants residing within the manor of Easingwold aforesaid a free market to them and their heirs and assigns for ever for all manner of cattle and commodities whatsoever without paying any manner of toll for the same: In consideration whereof the said William Marshall, R. R., J. L. and J. C., and the aforesaid inhabitants, do hereby give and grant unto the said G. Hall, his heirs and assigns for ever, one little house standing in a street in Easingwold aforesaid called the Lowe Street. which house is commonly called the Court House, with the ground whereon it standeth, and also all such waste grounds adjoining to the market place as shall be needful for him to build upon for the advancing the said market, together with the market place, the said wastes extending from the dennynge trough as the watercourse runs on the west of the market place to John Jarom's garth side, and on the east from the dennynge trough to the said John Jarom's garth side as the wain way goes to the Cucking Stool Hill. To have and to hold the said Court house, and ground whereupon it standeth, the said market place, and other the wastes adjoining as aforesaid, to him the said G. Hall, \*his heirs and assigns for ever, to his and their only proper use and behoof for ever, and for and to no other use, intent, or purpose whatsoever. And they further covenant to and with the said G. Hall that they the said W. Marshall, R. R., J. L. and J. C., and the rest of the inhabitants of Easingwold aforesaid, at their proper costs and charges, shall and will, within the term of nine months now next ensuing and following the date hereof, lead or cause to be led to the said market place, for the first paving thereof, so many stones as will sufficiently pave the same, and then he the said G. Hall, his heirs and assigns, to maintain the same for ever after. And the said G. Hall for himself, his heirs and assigns, doth hereby fully covenant, grant and agree to and with the said W. Marshall, R. R., J. L. and J. C., and the rest of the inhabitants aforesaid, their heirs and assigns for ever, that he the said G. Hall, his heirs or assigns, at his and their proper costs and charges, shall build the said toll booth or town house, containing ten yards long and six

yards broad at the least, to the use of the inhabitants as well as himself, to go up one pair of stairs at the west end of the house or building of the said G. Hall which now is erected in the market place of Easingwold aforesaid; and that it shall and may be lawful for the said W. Marshall, R. R., J. L. and J. C., and the rest of the inhabitants aforesaid, their heirs and assigns for ever, to keep there the Courts, bylaws, and public meetings for the townsmen for ever, without the let or molestation of him the said G. Hall, his heirs or assigns for ever; and that he the said G. Hall, his heirs or assigns, shall keep the said toll booth in good repair, with all manner of needful reparation at his costs and charges for ever more: And, lastly, doth covenant that the said W. Marshall, R. R., J. L. and J. C. and the \*rest of the inhabitants aforesaid, their heirs and assigns for ever, shall have a free market within the said town of Easingwold, to buy and sell all manner of cattle and commodities whatsoever, toll free, in as ample manner and form as the said George Hall hath it by the recited letters patents from his Majesty, without the lawful let, trouble, molestation, interruption or eviction of him the said G. Hall, his heirs or assigns, or any other person or persons lawfully claiming by, from or under him.

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[ \*37 ]

"In witness whereof the parties above said to these present indentures interchangeably have set their hands and seals the day and year first above written." Annexed to the deed was a schedule headed "The inhabitants of Easingwold," containing the names of 138 persons, male and female. Some signatures were in the following form: "Hered. Francis Easterry." All the women styled themselves "vid." (widow). It appeared by indorsement on the deed (1) that livery of seisin was given by Marshall, Reynolds, Lindesley and Cowpland, with the consent of the subscribing inhabitants.

The defendant alleged that this deed created an exemption from stallage as well as from market tolls: the plaintiff contended that it took effect only as to the common market tolls. The learned Judge reserved the point: and a verdict was found for the plaintiff on the first issue, as to stallage, and for the defendant as to the residue of the issues.

Alexander, in Easter Term, 1839, obtained a rule to show cause why a nonsuit should not be entered, or a general verdict for the defendant. In Michaelmas Term, 1840 (2),

- (1) More fully stated, p. 279, post. Denman, Ch. J., Littledale, Williams,
- (2) November 21st. Before Lord and Coleridge, JJ.

Lockwood

Cresswell, Tomlinson and Raines showed cause:

Wood.

First. The grant of exemption from toll contained in this deed does not carry an exemption from stallage. Secondly. If this is a grant made to the inhabitants of a town as a class, it is void, because they have no capacity to take, unless incorporated: if it is relied upon as a grant to the individuals who subscribed the deed, their heirs and assigns, the answer is that the defendant here was not proved to be heir or assign of any such person. (The argument on the capacity of the inhabitants to take was not fully gone into, the Court directing the attention of counsel principally to the first point.) Nothing can turn upon the grant of 1639; the King at that time had not the soil, and therefore could not grant any right in respect of stallage, though he might grant toll. the Crown may create a port, but cannot grant the privilege of unlading on the bank, if it be the land of a subject: Hale, De Portibus, p. 73; part 2, c. 6 (1). The whole question, therefore. arises on the deed of 1646; and the words there, "a free market." "to buy and sell " &c., "toll free, in as ample manner and form as the said George Hall hath it by the recited letters patents," would not, by force of the terms used, give an exemption from stallage,

[ \*39 ]

(LORD \*DENMAN, Ch. J. mentioned Bennington v. Taylor (4).)

even if the Crown had had the soil at the time of granting the letters

of the soil, and, as an incident to the soil, is distinguished from toll in *Heddey* v. *Welhouse* (2). If it is in any sense a toll, it is a toll sui generis, as is explained in *The Mayor*, &c. of Northampton v. Ward (3).

Stallage is in the nature of a rent for use and occupation

In that case it certainly was said by the Court that "tolnetum" may signify stallage, as a general word for such duties and payments; but there the defendant justified under a prescription to take "rationabile tolnetum" "pro qualibet duplici stallà" &c.; and, the question being, on motion in arrest of judgment, whether the prescription had been laid in proper words (the right itself being established), it was held that the meaning was sufficiently clear, though the plaintiff had used the word "toll" to describe stallage. That proves nothing decisive of the present case. In The Mayor, &c. of Norwich v. Swan (5) it was laid down that "right of market and right of soil are things totally distinct,"

<sup>(1)</sup> Harg. L. Tracts, 73. See Mayor of Exeter v. Warren, 64 R. R. 625; 5 Q. B. 773.

<sup>(2)</sup> Moore, 474.

<sup>(3) 1</sup> Wils. 107; S. C. 2 Stra. 1238.

<sup>(4) 2</sup> Lutw. 1517.

<sup>(5) 2</sup> W. Bl. 1116.

that "toll" could not be due for setting forth tables in a market, and that "no man can erect stalls in a market, without leave of the owner of the soil." In Mayor, &c. of Newport v. Saunders (1) LITTLEDALE, J., said that "stallage is a satisfaction to the owner of the soil for the liberty of placing a stall upon it:" and he treated the action of assumpsit for this duty as analogous to that of use and occupation for the enjoyment of premises. The original grant here gave to George Hall a right to hold a market in the town of Easingwold, not limiting him to any particular spot. If he afterwards acquired a property in land on which the market was held, he would then be entitled to stallage on that land, as well as tolls; till then, the right of stallage would shift according to the ownership of the soil used for the market.

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Alexander and Knowles, contrà, relied, in the first place, upon parts of the evidence (not stated in this \*report) as showing, by practice subsequent to the grant of 1646, how the term "toll free" had been understood. Then, as to the legal meaning of the word "toll," the authorities show that it was construed as including stallage in times not distant from that of the grant by Hall. Rex v. Corporation of Maidenhead (2) it was stated in argument, and seems to have been admitted by the Court, that piccage and stallage are of the nature of toll, and discharge of all manner of toll is discharge of piccage and stallage. Bennington v. Taylor (8), and Hickman's case (4), there cited (and referred to in 15 Vin. Abr. 245, tit. Market (B), pl. 2), show clearly that, in pleading a prescription, the word "toll" may cover stallage. That also appears by the definition of "toll to the fair or market" in 2 Inst. 220: and in Com. Dig. Market, (F 1), stallage is treated as toll. It may be said that Hall's covenant to the inhabitants, that they "shall have a free market" "to buy and sell" &c. "toll free," is restrained by the subsequent words "in as ample manner and form as the said George Hall hath it by the recited letters patents." But a general covenant in a deed is not to be contracted in its operation by a preceding or subsequent clause, unless the intention so to restrict it should appear by irresistible inference: Hesse v. Stevenson (5), Howell v. Richards (6). To limit a general covenant in this manner, there should appear "something

[ \*40 ]

<sup>(1) 37</sup> R. R. 456 (3 B. & Ad. 411).

<sup>(</sup>B), pl. 2. (2) Palm. 76, 86.

<sup>(3) 2</sup> Lutw. 1517.

<sup>(5) 44</sup> R. R. 880 (3 Bos. & P. 565).

<sup>(4) 2</sup> Roll. Abr. 123, tit. Market

<sup>(6) 11</sup> R. R. 287 (11 East, 633).

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[ \*42 ]

to connect it with a restrictive covenant," or else "words in the covenant itself amounting to a qualification: "Smith v. Compton (1). Nothing in this deed \*prevents the supposition that Hall granted to the inhabitants more than he took from the Crown. The contract on their part is not likely to have been made for a less consideration than the freedom of selling as well as buying. The grant of liberty to "sell" must have some operation; and it has none, unless freedom from stallage be granted, the owner of goods not being liable in other respects for merely going into the market to sell. words "in as ample manner and form as the said George Hall hath it by the recited letters patents" must be referred merely to the amount of privilege which Hall did take by the patent. "eviction" seems pointed at some interest in the land. If. therefore, the authorities go no farther than to show that "toll" may include stallage, it must be taken to do so here.

Cur. adv. vult.

LORD DENMAN, Ch. J., in Hilary vacation (February 4th), 1841, delivered the judgment of the Court:

After giving the substance of the pleadings and the charter of Charles I., his Lordship stated the result of the evidence for the plaintiff, as at p. 266, ante. He then continued as follows:

On the part of the defendant, after a notice having been given to produce the original deed creating an exemption from toll, and it not being produced, secondary evidence of its contents was given by a copy which was handed up to us. It appears to be an indenture of the last day of August, 1646, between George Hall of the one part, and William Marshall and three others, by the name "of Easingwold" and "bylawmen" of Easingwold, on behalf of themselves and all the inhabitants of \*Easingwold mentioned in the schedule thereto annexed, by and with the consent and approbation of all the said inhabitants of Easingwold, of the other part. And, after reciting &c. (His Lordship here stated the substance of the deed.) That deed was signed by 130 or 140 inhabitants of Easingwold, and signed and sealed by Marshall and the three other persons, and livery of seisin given of part of the premises in the name of the whole by Marshall and the three other persons, by and with the consent of the inhabitants within named, in the presence of twelve witnesses.

My brother PARKE was of opinion that the said deed did not (1) 37 R. R. 387 (3 B. & Ad. 189, 200).

exempt the inhabitants from this claim for stallage. There was a question as to part of the evidence to be left to the jury, which is immaterial as to this point. The point was reserved by my brother Parke as to the exemption from stallage, with liberty to turn it into a special verdict if the Court thought fit. The jury found a verdict for the plaintiff, damages 1s., as far as relates to the stallage.

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The question to be decided as to the effect of the deed by which the exemption is created is, whether it be merely an exemption from the common market tolls, or whether it extends also to stallage. The words of the grant of Charles I. are, that Hall may have and hold in the town of Easingwold the markets and fairs there mentioned, together with a court of pie-powder, and with all the tolls and profits thereof coming and arising; and that Hall might take such tolls and profits there as were had and taken in the town of Thirsk. We will first consider what is the general meaning of the word "toll" as applicable to fairs and markets.

In the Second Institute, p. 220, on the Statute of \*Westminster the First(1), c. 31, which was on the subject of outrageous tolls, Lord Coke says "Toll to the fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, piccage, or the like."

This opinion of Lord Coke has received judicial confirmation in the case of Bennington v. Taylor (2), which was an action of trespass for seizing goods. The defendant there pleaded that the Dean and Chapter of the Cathedral Church of Peterborough were seised of a manor, and prescribed for a fair, and to have and take the reasonable toll, to wit, among other things, for every double or large stall called a double covered stall, and for the ground about and near the stall and occupied with it, 1s.; and, in default of payment upon demand, to distrain for it. Issue was joined on the After a verdict for the defendant, several exceptions prescription. were taken in arrest of judgment. The prescription was that the Dean and Chapter had a reasonable toll, to wit, among other things, for every double stall &c., and for the ground and soil occupied with it, 12d.: and toll and stallage are two different things; and therefore all that comes under the videlicet is repugnant and void. the exceptions in this case were not allowed, because toll may well signify stallage as a general word for such duties or payments. And Justice Powell cited Hickman's case (3), where it is said, the lord of

[ \*48 ]

<sup>(1) 3</sup> Edw. I.

<sup>(2) 2</sup> Lutw. 1517.

<sup>(3) 2</sup> Roll. Abr. 123, tit. Market

<sup>(</sup>B), pl. 2.

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[ \*45 ]

the manor may prescribe to have the eighth part of a bushel of corn in four bushels, brought to market in the manor, by name of toll, for stallage, sold or not sold, and that \*that is a good prescription, although it be to have it in specie. There were other objections made to the plea, which were overruled, and judgment was given for the defendant by the whole Court.

In the course of the argument a case was cited from Palmer (1) which was a quo warranto against a corporation for claiming certain franchises and privileges; a market every Monday; piccage, stallage, toll, &c.; they pleaded there had been an ancient bridge near the town which had been repaired time out of mind by a fraternity which had been dissolved, and that the King, in consideration that the corporation would repair the bridge, granted to them a market with piccage and stallage, toll &c., under which &c.: and to which plea there was a demurrer, which was argued by several counsel on both sides: and, although a great deal of learning is displayed on a variety of matters connected with fairs, markets, piccage and stallage and tolls, none of them bear on the present case until the end of the report, when, the counsel having objected that piccage and stallage are not due of common right, and therefore there ought to have been a sum certain for them, the counsel on the other side answered that they are of the nature of toll, and a discharge of all manner of toll is a discharge of piccage and stallage; and that appears, because, in a grant, by the words cum omnibus libertatibus et liberis consuetudinibus (2), piccage and stallage are granted, as appears by a charter enrolled, 15 Ric. II., by a grant to the Bishop of Salisbury, 1 Edw. III., and a grant to the Prince of Wales, 5 Edw. IV.: and this case is stronger because the piccage and stallage are mentioned \*by special name. The Court gave no judgment as to the point now under discussion, nor could they, because piccage and stallage are distinctly mentioned in the pleadings.

Another case was also cited, *Heddey* v. *Welhouse* (3) to show that toll and stallage were different things. The counsel put four things for the consideration of the Court: but the Judges only decided on one; that toll was not incident to a fair of common right, and that no one shall have toll in a fair, except by grant or prescription; and,

<sup>(1)</sup> Rex v. Corporation of Maidenhead, Palm. 76.

<sup>(2)</sup> See The Earl of Egremont v. Saul, 45 R. R. 647 (6 Ad. & El. 924).

<sup>(3)</sup> Moore, 474; S. C. Cro. Eliz. 558, 591. See, as to this case, *Wright* v. *Bruister*, 38 R. R. 232 (4 B. & Ad. 116, 117).

the toll there not being by grant or prescription, they shall not have toll: and, note, in the argument of this case the Judges held that the King may grant toll with a new fair, if the toll be reasonable and not excessive, but a penny for a beast they held unreasonable: and he may grant pontage and murage to be taken by him who erects a new bridge or wall, because it is for the ease of the people; but that toll is payable of common right only for live cattle, and not for victuals or other wares (rather a singular position perhaps); that for that the lord is satisfied in the stallage and piccage: and they held that stallage and piccage is incident to the soil; and therefore, if the King grants a market with toll certain to one and his heirs to hold in land which is borough English, and the grantee dies, the heir at common law shall have the fair and market and the toll, but the younger son shall have the piccage and stallage with the soil.

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In Brooke's Abridgement (1), tit. Toll, pl. 2, it is said that by common law a man shall pay toll for nothing \*brought into a fair but for things sold; but by custom he may pay for every thing brought into the fair, and he shall pay for his place and his stand although he sell nothing.

[ \*46 ]

It may be said that these cases in Moore and Brooke's Abridgement show that toll and stallage are different things, and unless the owner of the fair or market has the soil either as freehold or in possession he cannot claim stallage. But the question here is whether a grant or exemption of the general word "toll" is sufficient to exempt from market toll and also stallage. The first was considered in *Bennington* v. *Taylor* (2) and the above case of *Heddey* v. *Welhouse* (3) and the case in Rolle's Abridgement (4) were cited: the Court held the general word "toll" included stallage; and we also come to the same conclusion.

Then how does this apply to the present case? It is said that the manor of Easingwold was not in the Crown at the time of the grant of Charles the First: and we think that quite immaterial; the manor being or not in the Crown could not affect the grant of the fair or market unless the Crown had assigned to Hall a place on which to hold the fairs and markets. The words of the charter are with the "profits thence arising and proceeding;" but Hall could not claim stallage unless he had a place to hold the markets and fairs either by

<sup>(1)</sup> Part 2, 258 b.

<sup>558, 591.</sup> 

<sup>(2) 2</sup> Lutw. 1517.

<sup>(4)</sup> Hickman's case, 2 Roll. Ab. 123,

<sup>(3)</sup> Moore, 474; S. C. Cro. Eliz. tit. Market (B), pl. 2.

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[ \*47 ]

[ \*48 ]

gift of the Crown, or by having the manor and as such having a general range of places to hold the fair and market, or by having land either freehold or otherwise in it, in any of which cases he could claim stallage at whatever time after the charter \*of the Crown he should become interested in the lands. If he never was so interested, he might nevertheless hold the fairs and markets on land belonging to other persons by their mere sufferance and permission(1): but unless he had the actual possession of it he could not claim stallage. But, if at any time after the charter of the Crown he should become seised in fee of any land, and hold his fair and market there, he might grant an exemption as well of common market toll as of stallage, which would bind those who claimed the land under him.

The deed of 1646 explains the relative situation in which all these parties stood. We collect from the deed that the inhabitants of Easingwold were the beneficial owners of the market place and premises adjoining; but as inhabitants they could have no legal interest; the powers of ownership were exercised by the public officers of the town with their assent; the bargain is then entered into by them and Hall, that, for the reasons and under the circumstances stated in the deed, they should convey the market place and premises adjacent to Hall, and he in return should grant them the exemption mentioned in it. Then, to carry this arrangement into effect, the bye-lawmen with the assent of 130 or 140 inhabitants enfeoff Hall of this market place and the adjoining premises, and livery of seisin is given. We say enfeoff, because the words "give and grant" to a man and his heirs are of the same effect as the word "enfeoff;" and, according to Co. Litt. 9 a., they are more ancient words to denote a conveyance than the word "enfeoff." See also upon this point Stampe v. Burgesse (2). The inhabitants of \*Easingwold must certainly have meant that if they were to have an exemption at all they were to have it for a charge which arose out of the land they had given up to Hall, and which they had retained in their own possession, and which would have relieved them from the payment of stallage themselves, and would also entitle them to claim a compensation from Hall for the privilege of holding his fairs and markets there.

holding his fairs and markets there.

Although such may have been the intention of the inhabitants of Easingwold, has that been carried into effect? The recital in the

deed states that Hall was to grant to the inhabitants of Easingwold

(1) See Attorney-General v. Horner Q. B. 231, 235.—A. C. (1884) 14 Q. B. D. 254, 264, 54 L. J. (2) 2 Roll, Rep. 73.

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a free market for all manner of cattle and commodities whatever. without paying any manner of toll: and the grant of exemption in the latter part of the deed is, that the inhabitants and their heirs and assigns "shall have a free market within the said town of Easingwold, to buy and sell all manner of cattle and commodities whatsoever, toll free, in as ample manner and form as the said George Hall hath it by the recited letters patents from his Majestv. without the lawful let" of him or any other. The toll which Hall had under the letters patent we are of opinion, as we have expressed before, included stallage; that is, although he had it not at the time of the grant from the Crown from the want of his having the land where the markets and fairs were held, yet he would have the right to the stallage when he got the land; and, as the accession of the land to Hall and the grant of exemption by him were simultaneous acts by the same deed, founded on the consideration there mentioned, we think it has the same effect as if he had acquired the market place &c., at the time prior to the grant of exemption including stallage.

And, as the plaintiff in this case claims under Hall, in the view we have above taken of the case we should have thought the rule should be made absolute to enter a verdict for the defendant; but, in showing cause against this present rule, the counsel for the plaintiff contended that, if the effect of the deed was to grant exemption to the inhabitants of Easingwold generally, they were not such a description of persons as could claim the exemption as such, and that, on the other hand, if the effect of the deed was not to grant exemption to the inhabitants generally, but was confined to the persons whose names were mentioned in the schedule, their heirs and assigns, there was no evidence that the defendant was either heir or assign of any of those persons. None of these points were considered at the trial. As this application is not for a new trial, but for a verdict to be entered for the defendant, the plaintiff has a fair ground to contend that he has a right to the opinion of the Judge at the trial on matter of law, and of a jury as to the matters of fact, which may arise out of this question: and therefore we think we cannot, in the present state of things, direct that a verdict should be entered for the defendant, but that there ought to be a new trial.

Rule absolute for a new trial.

**[ 49 ]** 

# IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

1844**.** *April* 23.

[ 50 ]

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(6 Q. B. 50—69; S. C. 13 L. J. Q. B. 365; 8 Jur. 543.)

See head-note, p. 265, ante.

This cause was again tried, before Lord Denman, Ch. J., at the Yorkshire Summer Assizes, 1841; when his Lordship directed a verdict for the defendant; upon which direction a bill of exceptions was tendered.

The bill stated that the plaintiff gave in evidence the grant by

letters patent of 6th August, 15 Car. I., (which were set out in the original Latin); and also gave evidence that the manor and lands of Easingwold did not, at the time of making the grant, or at any time since, belong to the Crown: that he further proved deeds of conveyance of the market, fair, market place, lands, edifices and buildings to himself and his heirs, tracing the title in fee simple from 1757, and gave evidence of ownership by the parties to whom the conveyances were respectively made. The bill of exceptions then alleged that the counsel for Lockwood also called "witnesses who proved (among other things) the receipt and perception, as far back as living memory went, by the said W. Lockwood and those under whom he claimed, of tolls, and stallage, or a compensation for the liberty of placing stalls and other things on the ground and soil of such market on the days when such market and fairs were holden, from divers persons not being inhabitants of the township and manor of Easingwold; and that the same did not exceed the \*payments for tolls and stallage, respectively, which had been and were received in the market of Thirsk." That Lockwood's counsel also called witnesses "who gave evidence that payments had from time to time been made to the owners of the market place of Easingwold, by inhabitants of Easingwold, for whom such owners provided stalls, set up by such inhabitants in the market place on market days and fair days, such payments being proportioned to the length of the stall, but being three or four times as much on fair days as on market days; which stalls were kept and taken care of for them by the owners of the market place in the toll booth in the intervals between market days and fair days; and that such persons kept their own places in the market place and paid more for some situations than others." That the counsel for Lockwood also

[ \*51 ]

proved that stallage had been demanded of Wood, and payment refused by him.

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The bill further stated that the defendant's counsel produced the deed of 31st August, 1646, which was set out, with the schedule of names, as stated in the judgment of the Court of Queen's Bench. "And on which said deed was indorsed a memorandum of livery and seisin of the house called the Court House therein named, in the name of all the premises therein mentioned, in these words, to wit, 'sealed and delivered, and also quiet and peaceable possession and livery and seisin given to the within named George Hall of the house called the Court House, in name of all the premises within written, by the within named William Marshall, Richard Reynolds the younger, John Lindsey the younger, and John Cowpland, by and with the consent of the inhabitants within named, the day and year \*within written, in the presence of us whose names are subscribed.' And thereunder were certain names subscribed. And it was further, among other things, proved that the said markets of Easingwold had, from as far back as living memory went, been, and were, held in the place named in the said deed for the holding of such markets, the same being an open and unenclosed public place, partly paved, in the town of Easingwold, as described in the said deed: and that the said toll-house or booth, during all the time aforesaid, had been and then was used by the inhabitants of Easingwold for the public meetings of the said town when occasion required: and no evidence was given of the payment of any rent or acknowledgment for such use of the same; the key of the said booth being kept by the said W. Lockwood and those under whom he claimed, who had sometimes let the use of the booth as a Dissenters' meeting room, as a place for public exhibitions, and for other purposes, and received rent or payment for such uses of the booth. It was proved that part of the space below the booth was used by the said W. Lockwood, and those under whom he claimed, as a place for the deposit of stalls let out to hire by them to be used on market days and fair days for exposing goods to sale thereon in such market place by persons requiring the use of such stalls for that purpose. It was proved that another part of the space below was used as a saddler's shop, and that the rents of that shop, and of certain shambles and other buildings standing on the said market place, had been received by the said W. Lockwood and those under whom he claimed, and the repairs of the booth and the market place done by him and those through whom he claims; and that

[ \*52 ]

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the said James Wood was, and \*had been for twelve years last past, an inhabitant of the said town and manor of Easingwold, and the occupier of a small house and farm there within the said town and within the manor of Easingwold. But no evidence was given, and it was admitted by the counsel for the said James Wood that he could give no evidence, to connect the said J. Wood with the said deed, nor to prove him to be heir or assignee of any of the persons named in the said deed, except the proof of the fact that he had been, and was, such inhabitant, and such occupier of the said house and farm: but no evidence was given that the same had ever belonged to, or been occupied by, any of the persons named in the said deed or the schedule thereto. And it was also, among other things, in evidence, on the part of the said J. Wood, that the inhabitants of Easingwold, from as far as living witnesses could recollect continually hitherto, had used and enjoyed the said market to buy and sell all cattle and commodities whatsoever toll And the counsel for the said J. Wood also called divers witnesses who gave evidence that, from as far back as such witnesses could recollect, continually hitherto, inhabitants of Easingwold, providing and keeping their own stalls used by them on the market place for buying and selling all manner of commodities there, had made no payments to the owners of the market place for the use or occupation of the market by such stalls, nor any other payments whatsoever; and that, in several instances before the present claim, claims for stallage had been made by the owners of the market place from such inhabitants, and in all those instances such claims had been resisted, and had not been persisted in, such inhabitants claiming to \*use the market, and place their own stalls there, free from all manner of payments."

[ \*54 ]

The bill then, after stating the points pressed upon the Lord Chief Justice by the respective counsel, described his Lordship's ruling upon them as follows: "And the said Chief Justice did then and there declare his opinion to the jury aforesaid, that the right to stallage was in the nature of rent, and that the owner of land was entitled thereto, unless prevented by particular circumstances; that, in this case, George Hall, the grantee of the market, had no title to the land but by the charter, and by the deed put in on behalf of the said James Wood; that the land and soil of the market place vested in him the said George Hall, with an exemption of the inhabitants of Easingwold from any sort of payment for the use of the said market and market place; that he, the said Chief

JUSTICE, was of opinion that stallage was included within the terms of the said exemption; and that the said J. Wood, an inhabitant of the town of Easingwold, was entitled to such exemption. And the said CHIEF JUSTICE therefore directed the said jury that the said deed and matters aforesaid were a bar to the said action of the said William Lockwood, and directed the said jury to give their verdict for the said J. Wood. Whereupon the said counsel for the said William Lockwood did then and there, on the behalf of the said W. L., except to the aforesaid direction and opinion of the said CHIEF JUSTICE, and insist that the said deed and matters aforesaid were no bar to the said action, and that the said W. L. was, upon the evidence aforesaid, notwithstanding the said deed and matters aforesaid proved by the counsel for the said J. Wood, entitled to a verdict for the amount of the value of stallage aforesaid for the \*aforesaid use of the aforesaid market place by the said James Wood." And that the jury found a verdict for the defendant Wood, under the above direction.

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Judgment having been entered for the defendant in the Court of Queen's Bench, error was brought in the Exchequer Chamber. The case was argued in Trinity vacation, 1848 (1), before Tindal, Ch. J., Coltman, Erskine and Maule, JJ., and Parke, B., and in Michaelmas vacation, 1848 (2), before Tindal, Ch. J., Coltman, Erskine and Maule, JJ., and Gurney, B.

Erle, for the plaintiff in error (the plaintiff below):

The inhabitants, as such, could not take by the deed. They are not incorporated; and it is not shown that the parties now insisting on the grant are privies to the original parties. "The parishioners or inhabitants, or probi homines of Dale, or the churchwardens, are not capable to purchase lands:" Co. Litt. 3 a. Such a privilege might exist by custom, but not by grant, for it cannot be prescribed for: Day v. Savadge (3), first point; and prescription supposes a grant. And, conformably with this rule, in the case of custom, the right must be laid in the land; in that of prescription or grant, it must be laid in the persons: Gateward's case (4). It seems to have been otherwise where the grant proceeded from the Crown: but that was because a grant from the Crown to the inhabitants of a place made them a corporation, eo intuitu only; \*Anonymous (5)

[ \*56 ]

<sup>(1)</sup> June 17th.

<sup>(2)</sup> November 27th. The argument was taken before five Judges, by consent of counsel, on each day.

<sup>(3)</sup> Hob. 85 (5th ed.).

<sup>(4) 6</sup> Co. Rep. 59 b; S. C., as Smith v. Gatewood, Cro. Jac. 152.

<sup>(5) 1</sup> Dyer, 100 a, pl. 70.

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[ \*57 ]

case in Dyer. In Com. Dig. Capacity (B 1), the doctrine laid down in Co. Litt. 3 a, is adopted. In an Anonymous (1) case in the Year Book of Henry IV. it is laid down: "Si terre soit done parochianis talis Ecclesia ad inveniendum unum presbiterum vel hujusmodi, &c. le done ne vault riens, pur ceo que il n'ad ascun chose corporate, que puit prender estate." It cannot be said that this grant is to operate by way of exception from the thing granted; for it does not appear that the inhabitants, as such, ever possessed the land. And an exception can only be of part of what is granted; and therefore an incorporeal easement cannot arise by way of an exception out of a grant of land: Doe d. Douglas v. Lock (2). Nor can this distinct privilege be a reservation: it is a new grant: Wickham v. Hawker (3).

(He then argued as to the effect of the words of the grant, supposing it valid: but on this point it is sufficient to refer to the arguments in the Court below (4).)

# Knowles, contrà:

The modern law is laid down in the As to the first point. authorities cited. But anciently the doctrine was not so strict. A custom might originate in a grant. In Fitch v. Rawling (5) it was held that a custom for all the inhabitants of a parish to play at all lawful sports in the close of A. was good: and Heath, J. \*said that the lord might have granted such a privilege before the time In Rex v. Mashiter (6) it was granted by charter to the of memory. inhabitants of a manor that they might elect a justice. In Tyson v. Smith (7) it certainly appears to have been intimated from the Bench, during the argument (8), that a custom could not originate in a grant, for that a grant would make a prescription. seems to go too far. And the authorities cited on the other side do not relate to an easement: they show only that an interest in land cannot pass to inhabitants as such. That is the language in

- (1) Year B. M. 10 Hen. IV. fol. 3 B., pl. 5.
- (2) 41 R. R. 496 (2 Ad. & El. 705, 743).
- (3) 7 M. & W. 63; and see The Durham and Sunderland Railway Company v. Walker, 57 R. R. 842 (2 Q. B. 940).
- (4) The following additional authorities were cited: Lord Middleton v. Lambert, 40 R. R. 309 (1 Ad. & El. 401); and (chiefly as to the propriety of explaining the deed by evidence of
- usage, or other extrinsic matter) Withnell v. Gartham, 3 R. R. 218 (6 T. R. 388); Rex v. Mashiter, 45 R. R. 433 (6 Ad. & El. 153); Jewison v. Dyson, 9 M. & W. 541; Moseley v. Motteux, 10 M. & W. 533.
  - (5) 3 R. R. 425 (2 H. Bl. 393).
  - (6) 45 R. R. 433 (6 Ad. & El. 153).
- (7) 48 R. R. 539 (9 Ad. & El. 406), in Exch. Ch.; affirming the judgment of the Court of Q. B., Tyeon v. Smith, 6 Ad. & El. 745.
  - (8) 48 R. B. 548 9 Ad. & El. 417).

Co. Litt. 3 a. Day v. Savadge (1) contains nothing inconsistent with this: the language there used shows only that a plea of discharge by freemen generally must be by way of custom, not prescription. The effect of Smith v. Gatewood (2) is that inhabitants, unless incorporated, cannot prescribe for profit, but may prescribe for easement. This is an easement. The Anonymous (3) case in Dyer applies only to grants of land. In Rex v. Mashiter (4) LITTLEDALE, J. said, of the word "inhabitants," that "in the grant of a way over a field to church it would extend to all persons in the parish." In Abbot v. Weekly (5) the Court seems to have doubted whether an easement for all the inhabitants of a vill to dance in the plaintiff's close was laid ill, though pleaded by way of prescription. In Foxall v. Venables (6) a question arose whether inhabitants could prescribe for matter of interest, or could \*do so only in the case of an easement: there the Court appears to have been divided. Afterwards, in Baker v. Brereman (7), all the Court held "that inhabitants may allege prescription for a way to a church or market, which are of necessity, and in matter of discharge, as in modo decimandi, or to be quit of toll; but not in matter of profit or charge in another soil." That case is precisely in point. Shelton v. Montague (8) is to the same effect: and there the Court collected that the prescription set up (for a modus) was matter of But, further, the inhabitants here may well have excepted something to which they had a right out of the grant to Hall. Hall would be estopped from denying that they had not a right in what they granted to him, or what they professed to except as part of the same thing. Or the grant of the privilege may be treated as a condition under which Hall took. And it may even be contended that the defendant may represent some of the individuals who were parties to the deed, though the mesne assignments were not traced. (He also argued on the other points (9).)

Erle, in reply:

This professes to be a grant; it has not the character of a discharge: and the only question is, whether it could operate to transfer from Hall to the inhabitants at large that which he took by the grant from the Crown. The cases cited on the other side

(1) Hob. 85.

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- (2) Cro. Jac. 152; S. C., as Gate-ward's case, 6 Co. Rep. 59 b.
  - (3) 1 Dyer, 100 a, pl. 70.
  - (4) 45 R. R. 433 (6 Ad. & El. 165).
- (5) 1 Lev. 176.
- (6) Cro. Eliz. 180.
- (7) Cro. Car. 418.
- (8) Hob. 118.
- (9) See p. 282, note (4), aute.

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[ \*58 ]

LOCKWOOD v. WOOD. [\*59] show little more than the anxiety of the Courts to support, quácunque viâ, what appeared to have prevailed for a long time. Some of the decisions relate to matter \*sui generis. Thus Shelton v. Montague (1), though said to relate to a discharge, in fact arose upon the question what the parson was to receive. Baker v. Brereman (2) related to a way, which may be dedicated to the public. As to title in the defendant through parties to the deed, no proof of such a fact was offered.

TINDAL, Ch. J., in last Easter Term (April 23, 1844), delivered the judgment of the Court:

This was a bill of exceptions tendered by the plaintiff below (who is also the plaintiff in the court of error) against the direction of Lord Denman at the trial of the cause at the Assizes holden for the county of York, in the autumn of the year 1841. The plaintiff declared in debt for stallage duties due and payable to him as the proprietor of a certain market and market place in the county of York, to which declaration the defendant pleaded the plea of "Never indebted."

At the trial, the plaintiff gave evidence (amongst other things) of the grant, by King Charles the First, in the fifteenth year of his reign, to one George Hall and his heirs, of a weekly market and two fairs in the year at Easingwold, in the county of York, with certain specified tolls and profits: he also proved the seisin in fee of the plaintiff in the said market and fairs and the tolls and profits thereof, and the seisin of the plaintiff in his demesne as of fee of the soil and freehold of the market place at Easingwold, and the user of the market by the defendant by placing a stall upon the market place on several market days; the defendant being, as proved by the plaintiff, an inhabitant of the township of Easingwold.

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The defendant, on the other hand, gave in evidence a certain deed, bearing date the 31st August, 1646, being made between the said George Hall, the grantee of the said market, of the one part, and four persons therein named of the other part, who are therein described as "of Easingwold," "yeomen, and byelawmen for this present year 1646 for the said town of Easingwold, on the behalf of themselves and all the inhabitants of Easingwold aforesaid mentioned in a schedule hereunto annexed, by and with the consent and appointment of all the said inhabitants of Easingwold aforesaid;" the schedule thereto annexed being headed with the

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words "Inhabitants of Easingwold," and containing considerably more than one hundred names subjoined thereto. By that deed the four byelawmen and the rest of the inhabitants do give and grant to George Hall, his heirs and assigns for ever, (amongst other things) the market place at Easingwold, as described therein by certain metes and bounds. And the said George Hall thereby covenants (amongst other things) that the four byelawmen "and the rest of the inhabitants aforesaid, their heirs and assigns for ever, shall have a free market within the said town of Easingwold, to buy and sell all manner of cattle and commodities whatsoever, toll free, in as ample manner and form as the said George Hall hath it by the recited letters patents." There is upon the back of the deed an indorsement of livery and seisin having been given to George Hall of the premises described in the deed by the four byelawmen by and with the consent of the inhabitants within named.

It is unnecessary to advert to any other part of the evidence given by the defendant at the trial, as the whole question which has been raised before us turns \*upon the legal effect and operation of that At the trial the defendant's counsel insisted that the deed and other matters given in evidence amounted to a bar of the plaintiff's claim; whilst the plaintiff's counsel on the other hand insisted that the deed contained a grant of an exemption from tolls only, and not from stallage, and that stallage was not included in the terms of the grant; and further insisted that, even if stallage was included within the terms of the exemption, the defendant, not being one of the grantees, nor the heir or assignee of any of the grantees therein named, could not take the benefit thereof as an inhabitant of Easingwold, as such inhabitants were not incorporated; and therefore, he contended, that the deed ought not to be admitted as a bar to the plaintiff's right of action. LORD CHIEF JUSTICE thereupon told the jury that he was of opinion that stallage was included within the terms of the exemption, and that the defendant, as an inhabitant of the town of Easingwold, was entitled to such exemption, and directed the jury that the deed and matters aforesaid were a bar to the plaintiff's action. The plaintiff's counsel then excepted to each of those points so ruled by the LORD CHIEF JUSTICE; and the question before us is whether such ruling as to both those points is or is not consistent with law.

It is to be observed that the present cause had been already, in a former stage of the proceedings, before the Court of Queen's Bench Lockwood WOOD.

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[ \*62 ]

upon a motion for a new trial, and that, upon the arguments brought before the Court on that occasion, the same two points were made by the counsel for the plaintiff below, which form the ground of the present exceptions; and that the Court of Queen's Bench, after time taken to consider, in a very learned \*judgment, in which the principal authorities are reviewed and discussed, declared their opinion upon the first point to be, that the exemption from toll mentioned in the deed included an exemption from stallage also. After that judgment it is unnecessary for us to say more than that we entirely concur therein, and in the reasonings by which it is supported; and consequently we hold that the exception first tendered

With regard to the second point, viz. whether the inhabitants of Easingwold could claim an exemption from stallage under the description contained in the deed, the Court of Queen's Bench appear to have studiously abstained from giving any opinion; and both that Court and the Lord Chief Justice at the trial have been desirous that such questions should be put upon the record for the purpose of a more formal discussion; which has accordingly been done by the course taken at the trial. And we therefore proceed to consider this second ground of objection, as one which is altogether open, and unfettered by the authority of the Court below.

to the direction of the learned Judge at the trial is untenable.

And upon this point we are of opinion that, under the grant in question, a modern grant, not made by the Crown but by a subject, inhabitants cannot take by that name or description such an easement as that which is now under consideration, that is, a right to place their stalls on market days in alieno solo without making any payment for the same.

It was admitted, on the argument before us, that inhabitants cannot take land by that description in a modern deed. Indeed the authority of Co. Litt. 3 a, is express to that point. For, although it is added there, apparently by way of exception, "unless it were in ancient \*time when such grants were allowed," yet that exception would probably be found to be confined to grants by the Crown, and to stand upon the reason stated in Dyer's Rep. 100 a (1), that, if the Queen grants land by her charter to her good men of the town of Islington, without saying to them and their heirs, or to them and their successors, rendering a rent, it is a good corporation perpetual, to that extent only and no other, because that a rent is reserved, &c. But the argument on the part of the

(1) Anon. 1 Dyer, 100 a, pl. 70.

[ \*63 ]

defendant is, that the present grant is not the grant of land but of an easement only, or an exception or discharge, and that such an easement or matter in discharge may be claimed by prescription; and that, as every prescription presupposes a grant, so a grant of such an easement or discharge to the inhabitants of a town would be good in law at this day.

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If, indeed, the present claim could be considered as confined to and resting upon the ground of exemption and discharge, strictly so considered, there might perhaps be authority for contending that the inhabitants of a parish or vill might claim an exemption from toll by modern grant, and that by a private individual; for all the Judges held, in the case of Baker v. Brereman (1), that inhabitants may prescribe for matter of discharge, as in modo decimandi, or to be quit of toll. And again, as a composition real might have been made by a private individual, that is, by the parson, with the consent of the patron and ordinary, in favour of all the inhabitants, before the restraining statutes (see Bree v. Chaplin (2)), so also it would seem that a private individual might \*grant an exemption from toll to the inhabitants at large; and it affords some support to this argument that the writ De essendo quieto de Theolonio lay for persons exempt by Royal grant, who could not have been impliedly incorporated by such a grant, as merchants strangers: (Fitz. N. B. 227 D).

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But the claim in this case is not simply to be exempt from toll properly so called, but from a species of payment which, although included in the word toll in the deed in question in this case, is a compensation for the use of land: and the true nature of the claim of the inhabitants under the deed is a claim to a grant of the easement of going on the plaintiff's land, and pitching their stalls there on market days, without paying any thing for the use of the soil.

And, upon referring to the several authorities which have been cited in support of the validity of such a prescription, it will be found that the claim by the inhabitants, quà inhabitants, to any easement, wherever it has been allowed, has been invariably vested on the ground of custom, not on that of prescription. A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary

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to look out for its origin: but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a custom for all fishermen within a certain district to dry their nets upon the land \*of another might well be a good custom, as it was held in 5 Co. 84 (1); and yet a grant of such an easement to fishermen within the district eo nomine might well be held void.

The first case on which the defendant's counsel relied in argument was Gateward's case (2), reported in 6 Co. 59 b, and in Cro. Jac. 152. In that case, the claim was one by all the inhabitants of Stixwold to have common of pasture over the place called Horsington Holmes: but this claim was set up not as a prescription but a custom; and it was held that the custom was against law. Lord Coke goes on to state that "two differences were taken and agreed by the whole Court. 1. Between a charge in the soil of another and a discharge in his own soil. 2. Between an interest or profit to be taken or had in another's soil and an easement in another's But it is to be observed that all the instances put are, not those of prescriptions or grants, but of customs, viz. a custom that every inhabitant of a town hath paid a modus decimandi; a custom that every inhabitant of such a town shall have a way over such land either to the church or the market, &c.; and these it is said are good, for they are of an easement and no profit. And further Lord Coke says, that "another difference was taken, and agreed, between a prescription which always is alleged in the person, and a custom, which always ought to be alleged in the land: for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, et ex certá causá rationabili \*(as Littleton saith) usitata, but need not be intended to have a lawful beginning: " a difference which points out clearly the distinction which ought to govern the present case, viz. that such an easement in the inhabitants of Easingwold as is contended for, although it might be good by custom, if it had existed from time immemorial, yet it cannot be good by prescription, which must rest upon a grant to the inhabitants. And the report of the same case in Cro. Jac. (3) will not justify the inference contended for in argument, that claims to

- (1) The reference intended is probably to Bro. Abr. Customs, pl. 46; as to which see *Tyson* v. *Smith*, 48 R. R. 539 (9 Ad. & E. 411, 412).
- (2) 6 Co. Rep. 59 b; S. C. (as Smith v. Gatewood) Cro. Jac. 152.
- (3) Smith v. Gatewood, Cro. Jac. 152.

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easements by inhabitants of a town are good by prescription, merely on the ground that the reporter has used the word "prescription" instead of "custom," contrary to what is found in the report in Lord Coke, the question before the Court in that case turning on a custom, not on a prescription; and the attention of the reporter not being called to the distinction now under consideration. same observation disposes of the weight of the dictum of HEATH, J. in Fitch v. Rawling (1), in which case the question before the Court arose on a claim by custom, and the attention of the Court was not called to the distinction between custom and prescription. case of Abbot v. Weekly (2) is a strong authority that such claim by prescription would be bad. In trespass the defendant prescribed that all the inhabitants of such a vill had been used time out of mind to dance upon the close of the plaintiff at all times for their recreation, and so justified. And, after verdict for the defendant, one objection taken in arrest of judgment was, that the claim ought to have been laid by way of custom of the vill, not by way of prescription in the persons; and a \*case was cited where it had been so adjudged on demurrer. But the Court held that, although perhaps it would have been bad upon demurrer, yet, issue being taken on it and found by the verdict, it is good.

No direct authority has been cited to show that such a prescription is good. And, upon consideration of those which have been brought before us, we think they negative rather than support the position, that inhabitants of a town may, by that name and description, prescribe for an easement in alieno solo. And, if they cannot prescribe for such right when enjoyed beyond the time of legal memory, still less can they claim such right under a modern grant. And upon this ground we think the exception secondly taken at the trial to the direction of the learned Lord Chief Justice must be allowed, and that the judgment of the Court below must upon that ground, therefore, be reversed, and a venire de novo awarded.

Venire de novo ordered (3).

also called witnesses, who deposed that stalls had been placed in the market by inhabitants without payment or claim of duty, and that such claim had, in two or three instances, been made and successfully resisted: and his case was, that the exemption from stallage, though not maintainable on the deed since the decision of the Court of Exchequer Chamber, might

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[ \*67 ]

<sup>(1) 3</sup> R. R. 425 (2 H. Bl. 393).

<sup>(2) 1</sup> Lev. 176.

<sup>(3)</sup> The cause was tried a third time, before Pollock, C. B., at the York Summer Assizes, 1844; when the plaintiff again proved the charter of 1639, the deed of 1646, and the title deeds under which he himself claimed; and he called witnesses who proved payments of stallage. The defendant

1844. June 8.

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[ \*68, #. ]

REG. v. GOVERNORS OF ST. ANDREW, HOLBORN.

(6 Q. B. 78-99; S. C. 13 L. J. Q. B. 341; 8 Jur. 688.)

The Poor Law Commissioners caused an auditor to be appointed under stat. 4 & 5 Will. IV. c. 76, s. 46 (1), to audit the accounts of a union and the several parishes therein, to examine whether the expenditure was lawful, to strike out payments and charges not authorized by some provision of the law, or order of the Commissioners, and to see that the accounts were properly stated, with vouchers. A district within the union had already auditors under a local Act (6 Geo. IV. c. clxxv.) which provided for the maintenance of the poor and regulation of the nightly watch. Their duty under the Act was, to audit the accounts of the directors of the poor, which the directors were required to produce, with vouchers; no power of disallowing items was given to the auditors; but it was enacted that, if they disapproved of any part of the accounts, it should be lawful for them to appeal to the Quarter Sessions, entering into recognizance to pay costs if awarded against them: and the Sessions were empowered to award costs to the appellant or the party appealed against.

Held, that the directors, though they had accounted to their own auditors according to the local Act, were not thereby exempted from accounting to the union auditor under stat. 4 & 5 Will. IV. c. 76, s. 47.

The officers accounting for the receipt and expenditure of the poor rate to an auditor appointed by direction of the Poor Law Commissioners must account for all sums collected under the denomination of poor rate, and expended for any purposes (as watching, police, &c.) to which, by local or general Acts, the poor rate is applicable; not for those sums only which are raised and laid out strictly for the relief and management of the poor.

MANDANUS. After reciting the appointment of the above named directors under a local Act (6 Geo. IV. c. clxxv. local and personal,

be grounded upon usage anterior to the deed and charter, which usage was to be inferred from the facts stated by the defendant's witnesses. The LORD CHIEF BARON thought there was strong evidence to show that the inhabitants had not paid toll: he told the jury that they were to consider whether the Easingwold people had any custom, usage or rights of a date more ancient than the charter, which might have given rise to the state of things appearing on the evidence, or which would account for it; and he directed them to find whether stallage was included in the exemption from toll; if they thought it was, to \*give their verdict for the defendant; if not, for the plaintiff. The jury found for the defendant; and the LORD CHIEF BARON, in his subsequent report of

the case to this Court, said that he thought the verdict right.

W. H. Watson, in Michaelmas Term, 1844, moved for a rule to show cause why there should not be a new trial, contending that there was no evidence on which the question of immemorial usage could be left to the jury, and therefore they had been misdirected; or that, if there were any such proof, the verdict was against the weight of evidence. A rule nisi was granted. In Michaelmas Term (November 21st), 1845,

Knowles and Martin showed cause:

The evidence of the witnesses showed user of an assumed right, which, if possible, the Court will refer to a legal rather than to an illegal origin. Such

<sup>(1)</sup> Repealed so far as it relates to auditors by the District Auditors Act,

<sup>1879 (42 &</sup>amp; 43 Vict. c. 6), s. 11 and Sch. II.; see now ibid. s. 4.—A. C.

public), and that they had ascertained, charged and collected divers large sums of money for poor rates, and managed the expenditure of the same &c., and had appointed the other defendants to be collectors;

user cannot, consistently with the former decision in this case, be referred to the grant of 1646; but it may to a prior and immemorial usage, of which the grant itself affords evidence; and the whole question is whether there was any evidence for the jury. The charter of Charles I, merely empowered Hall to hold a market; between 1639 and 1646 he appears to have been negotiating with the inhabitants of Easingwold for land on which to hold The deed of 1646 shows that they then gave up some rights to him in exchange for the convenience he was about to provide for them; it is reasonable to presume that they reserved others, and that the exemption from toll, including stallage, was in effect a reservation so made. The deed shows that a market place already existed; and the probable supposition is that, by custom, though not by actual grant, a meeting for the purposes of a market was immemorially held in the town, without payment of any duties. Tyson v. Smith + shows that a right of placing stalls may exist by custom in an ascertained class of persons. And, if it may have existed so here, the Court will, in favour of continued enjoyment, assume that it did, on the principles laid down in 3 Stark. Ev. 904, tit. Prescription, Grant, &c. 3rd ed. ("So forcible" to " conduct of their affairs.") The deed of 1646, if it gives no exemption, would not take away one which existed before.

W. H. Wutson, Tomlinson and Hoggins, contra, were not heard.

#### LORD DENMAN, Ch. J.:

We are impressed with the necessity of upholding rights that have existed from ancient times, and that can legally exist; and of presuming in their favour from the fact of user. But the question here is whether any

evidence was given of the exemption claimed. On the evidence, I think it is clear that the market was created by the charter of 1639; that was followed up by the deed of 1646; and whatever exemption was enjoyed afterwards is accounted for by that deed. \*This certainly is so if the charter was the origin of the market. Is there any proof of an exemption before? No market is shown to have existed at any earlier time; there may have been buying and selling, but no legal market is proved. The charter does not even refer to such a custom as is supposed. The deed is supposed to furnish some evidence that a former market existed, because it mentions the "market place;" but this is on negotiation under a charter which had existed seven years when the deed was executed: and the deed makes no other allusion to the existence of a former market. I think, therefore, that it supplies no evidence. The jury have had a creature of imagination presented to them, on which to form a conjecture. Had there been any evidence of the asserted right we should have supported it: but I think there was none; and therefore the rule must be absolute.

(W. H. Watson referred to the recital in the charter, that an ad quod dannum had been previously executed.)

### WILLIAMS, J.:

The mention of a market place in the deed does not raise the inference of a market having existed before 1639. If the charter then granted was the origin of the market, the place may have acquired that name by 1646, though no market existed there before the charter. It is argued that, where user may be referred to an origin which will sustain it in point of law, and one that will not, the legal

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that, by an order of the Poor Law Commissioners, the part of the parish of St. Andrew, Holborn, which lies above Bars, and the parish of St. George the Martyr, had, with other places, been formed into a union, called the Holborn Union; and that the Commissioners, \*by another order (7th July, 1836), had appointed and declared that the said union, with divers other parishes and unions. should be united and should be a union for the purpose of appointing an auditor as therein mentioned; and also reciting that James Hales Mitchiner had been duly appointed such auditor under the last mentioned order, for the examining and auditing, allowing or disallowing, of accounts in the several parishes and unions therein mentioned, including the said Holborn Union, and that the defendants had refused, when required, to produce to the said J. H. M. "a full and distinct account of all moneys, matters and things committed to the defendants' charge, or received, held or expended by them on the behalf of the said parishes, so far as related to the moneys assessed for the relief of the poor: " the writ commanded the defendants forthwith to make and render to the said J. H. M., the auditor appointed &c., a full and distinct account of all moneys &c. committed &c., or received, &c. on behalf &c., so far &c. (as above).

Return. After stating that the rates assessed, charged and caused to be collected by the said governors and directors who were in office on the said 23rd January, 1838, commonly called the poor rates, were by law and by the provisions of the said local Act applicable to other purposes besides the relief of the poor and wholly unconnected therewith, and after denying that the said governors and directors managed and regulated the expenditure of any part of

one should be preferred. But here no evidence of the alleged legal origin appears.

COLERIDGE, J. was absent on account of indisposition.

# WIGHTMAN, J.:

The deed will account for all the exemption enjoyed since 1646; but, if there were any evidence of a previously existing market, that evidence might certainly raise a question whether the exemption did not result from a previous custom. Here no evidence on the subject appears, except from the deed itself: but that rather negatives the supposition when

it speaks of "the great charge that the said George Hall hath been at in procuring the said market, and the great benefit it is like to bring to the inhabitants and their heirs in the said town of Easingwold in time to come." The inference from the deed is, that the ground for a market house was given up in consideration of the exemption. The market may have been held somewhere for the preceding seven years: and the place where it was held may have gained the name of the market place. I therefore think there was no evidence for the iury.

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the moneys, so ascertained, charged and collected, which were assessed for, and were applicable to, the relief of the poor, and alleging that the expenditure of the whole of the moneys assessed for, and applicable to, such purposes was managed and \*regulated, without any controul or interference on their part, by the Board of Guardians for the time being of the union formed as in the said writ first mentioned, to which board, or to their order, they the said governors and directors duly paid over from time to time all moneys assessed and collected for the relief of the poor as and when they were required; the defendants further stated that they the said governors &c. who were in office on &c., before they were required to render any account to the said J. H. Mitchiner, had, in pursuance of the said local Act and the provisions of the Poor Law Amendment Act in that behalf, duly accounted for all moneys which came into their hands whilst in office to the auditors appointed under the said local Act, and that such accounts had been duly audited, passed and approved pursuant to the statutes in that behalf; and that the defendants the collectors had duly accounted to the said governors and directors for all moneys received by them, and paid over the balances in pursuance of the said local Act: And the defendants, who were governors &c. on &c., further returned that, after the issuing of the mandamus, and in pursuance thereof, viz. on 28rd July, 1839, they did make and render to the said J. H. M. a full and distinct account of all moneys, matters and things committed to their charge, or received, held or expended by them on behalf of the said parishes, so far as relates to the moneys assessed for the relief of the poor: and the said collectors returned that, long before the teste and issuing of the writ, they had duly accounted as required by the local Act, and had duly delivered up their books, accounts and vouchers to the governors and directors, and that they could not render the account required by the mandamus.

The said J. H. Mitchiner, by his traverse to the return, denied that the said governors and directors who were in office &c. did pay over from time to time to the said board of guardians for the time being of the union formed &c., or to their order, all moneys assessed and collected for the relief of the poor as and when they the said governors and directors were required so to do, in manner and form &c.: whereupon issue was joined. Mitchiner also by his said traverse denied that the said governors &c. did, after the issuing of the mandamus, and in pursuance of the requisition thereof, make and render to the said J. H. M. a full and distinct account of all

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moneys &c. so far &c., in manner and form &c.: whereupon issue was joined.

The cause came on to be tried before Coleridge, J. at the sittings for Middlesex after Michaelmas Term, 1840, when the jury were by consent discharged from giving a verdict on the first issue, and a verdict was found for J. H. Mitchiner, the prosecutor, on the second issue, for 1s. damages and 40s. costs, subject to the opinion of this Court upon a case, which was accordingly stated, and the material parts of which were as follows.

After the passing of stat. 4 & 5 Will. IV. c. 76, the Poor Law Commissioners, by an order duly signed, sealed and notified, dated 26th March, 1836, in pursuance of the powers of that Act, ordered that the parishes and places following, viz. St. Andrew, Holborn, above Bars, united with St. George the Martyr (being the district described in the writ as "that part of the parish of St. Andrew" &c. "and the parish of St. George" &c.), together with the liberty of Saffron Hill, Hatton Garden, Ely Rents and Ely Place, all in the county of Middlesex, should on the \*27th day of April then next be, and thenceforth should remain, united for the administration of the laws for the relief of the poor, by the name of the Holborn Union, and that a board of guardians should be appointed and chosen for such union, as therein mentioned.

The Commissioners, by a further order, dated 20th April, 1836, ordered that the guardians of the Holborn Union should, subject to the approbation of the Commissioners, appoint a sufficient number of persons to perform the duties thereinafter specified to belong to each of the offices thereinafter mentioned, including amongst others the office of auditor, and thereby ordered that the duties of the auditor to be so appointed by the guardians should be: "1. To audit the accounts of the said union and of the several parishes comprised therein at proper periods. 2. To examine whether the expenditure in all cases was such as might lawfully be made, and to strike out such payments and charges as were not authorized by some provision of the law, or by virtue of the orders, rules and regulations of the Poor Law Commissioners. 3. To see that the accounts were presented in the proper form, and that the particular items of receipt and expenditure were stated in detail, and supported by adequate vouchers of receipt and authority for payments, and that all sums received, or which ought to have been received, were brought into account."

The Commissioners, by a further order, dated 7th July, 1836, and

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addressed to the guardians and ex officio guardians of the parishes of St. Pancras and St. Martin in the Fields, and of the several unions known by the names of Strand Union, the Holborn Union, the Brentford Union, the Staines Union, and the Uxbridge Union, \*all in the county of Middlesex, and to the churchwardens and overseers, treasurers, auditors and other officers of the said parishes and unions, and of the several parishes forming part of such unions respectively, and to the clerk or clerks to the justices of Petty Sessions held for the division or divisions in which each such parish is respectively situate, declared that the several parishes therein mentioned, and the several parishes comprised within the unions therein mentioned, including the Holborn Union, should be united, and thenceforth be and be deemed a union for the purpose of appointing an auditor in the manner thereinafter provided: and that the guardians of such parishes and unions should, at the time and in the manner therein mentioned, appoint an auditor for the examining and auditing, allowing or disallowing, of accounts in the respective parishes and unions, and in each of the several parishes comprised in such unions respectively.

The Commissioners, by the same order, fixed a salary for the auditor, payable by the parishes &c. in certain proportions; the auditor to hold his office till May 1st then next unless otherwise ordered by the Commissioners &c., and to be &c., and be deemed, as to such united parishes and unions and each of them, an auditor appointed by virtue of the Poor Law Amendment Act, and of the Commissioners' orders under the same, and, during his said office, to be vested with, and empowered to exercise, all the powers and authorities, as to calling for and verifying by the oath or declaration of the parties required to verify the truth thereof the accounts of such parishes and unions respectively and the statements of such parties, as were in and by such Act given and provided for auditors in that respect. A \*further order was made, 29th April, 1837, as to the duration of the auditor's office.

The relief, government and management of the poor in the district described in the said orders as the united parishes of Holborn above Bars and St. George the Martyr in the county of Middlesex was, at the times of the passing of stat. 4 & 5 Will. IV. c. 76, and the making of the first order by the Commissioners, vested in a board of governors and directors constituted and appointed under an Act (6 Geo. IV. c. clxxv., local and personal, public) "for the better ascertaining, charging and collecting of the

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rates for the relief of the poor within that part of the parish of St. Andrew "&c., "and the parish of St. George," &c.; "for the better maintenance, employment and regulation of the poor thereof; and for regulating the nightly watch thereof."

Sect. 5 (1) directs that the ratepayers shall yearly elect fifty persons, who, together with certain ex officio guardians, shall be governors and directors of the poor, and shall and may from time to time make orders for the government, relief and maintenance of the poor, ascertaining, charging, collecting, managing and regulating of the poor rates, appointment &c. of watchmen and beadles, and regulation of constables. Sect. 12 directs them to meet twice every year to calculate and settle the sums to be assessed as well for the relief &c. of the poor, and for regulating and maintaining a nightly watch and beadles, as for discharging any debts previously incurred or remaining unsatisfied by reason of the deficiency of any Sect. 13 enacts that, after the said sums shall have former rates. been ascertained, the inhabitants and occupiers of premises within that part of the \*parish of St. Andrew &c., and the parish of St. George &c., shall, at a meeting of which notice is to be given, make two distinct rates or assessments, to be raised by an equal pound rate &c., their gross amount not to exceed the gross amount settled and ascertained &c., one for the relief &c. of the poor, the other for defraying the expenses of the watch and beadles, which rates shall be respectively entered in one or more book or books, and shall be collected, one moiety immediately, and the other after the expiration of three calendar months. Sect. 24 gives certain powers to the collectors; and sect. 28 authorizes the governors and directors to appoint and remove them &c.

By sect. 29, it is enacted that every clerk, treasurer and collector appointed by the said governors and directors "shall at all times, when thereunto required by the said governors and directors, render a full and perfect account of all moneys by them respectively received and paid by virtue of their said offices," and pay over the balance in their hands, if any, as the governors and directors shall appoint.

By sect. 30, it is enacted that the inhabitants and occupiers of the said parishes shall yearly elect, in manner therein mentioned, five fit persons to be auditors of the accounts of the governors and directors, qualified as in the said clause is mentioned: and that such auditors, or any three or more, shall meet twice a year to

(1) The clauses were set out more fully in the case.

audit the accounts of the said governors and directors to the period of such meeting, in the presence of their clerk, as in the said local Act mentioned: and the said governors and directors are thereby required to produce and lay before the said auditors at every such meeting a just and true account in writing, accompanied \*with proper vouchers, of all sums of money which have come to the hands of the said governors and directors or their treasurer by virtue of the said local Act, and of all moneys paid, laid out or expended by them during the said period, and in and about the carrying the said Act into execution, and other expenses incident thereto; and that, in case the said auditors shall think that there is just cause to disapprove of any part of the said accounts so to be presented, it shall be lawful for them to appeal against the same in manner as in the said local Act mentioned. And it is by the same section provided that no appeal against such accounts shall be made or proceeded in by any person or persons, except the same shall be directed by the said auditors or the major part of them, during such time as they shall be engaged in such accounts; and that all such accounts so audited shall be left at the board room, for the examination of the said auditors only, for three successive days, and afterwards for the inspection and information of the inhabitants of the said parishes for seven successive days.

By sect. 55 and the following sections, power is given to the governors and directors to borrow money for the purposes of the Act on the credit of the rate, and to grant annuities and give securities in manner there mentioned (1).

After stat. 10 Geo. IV. c. 44, "for improving the police in and near the metropolis" came into operation, no rates were made for defraying the expenses of the watch and beadles under the local Act, the functions of such watch and beadles having being superseded by the police force appointed under the said Act, and the expenses of such police force having been made payable out of the poor rate under the 23rd, 24th, and 25th sections of the general

(1) Sect. 69 (not set out in the case) gives to any person who shall think himself aggrieved by any rate or assessment made, or penalty imposed, or by any conviction or other matter or thing done in pursuance of this Act, an appeal to the first General or Quarter Sessions for the county of Middlesex which shall be held after the expiration of one month after the

time of making such rate or of imposing such penalty or conviction, the appellant entering into a recognizance to try, and to pay such costs as shall be awarded at the Sessions; and the justices in Sessions are empowered to hear and determine, and to award costs to the party appealing or appealed against.

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Act (1): and, accordingly, no separate watch rate was afterwards made by the said governors and directors; but only one rate was from thenceforth made under the name of the poor rate, out of which the said governors and directors paid as well the sums required for the relief &c. of the poor, as the contribution required for the police, the contribution required for county rates, the interest upon monies theretofore borrowed, and annuities granted by the said governors and directors under the said local Act, and all other expenses incident to the carrying the said local Act into execution: and this was the course pursued by the defendants as governors and directors whilst they were in office.

The case then stated the appointment of the first mentioned defendants, on Friday next after 25th March, 1837, to be governors and directors for the ensuing year, and the making of a rate by them, dated 25th August, 1837, entitled "a rate" &c. "of 1s. 2d. in the pound, for the relief, maintenance, lodging and employment of the poor of that part of the parish of St. Andrew" &c., "and the parish of St. George" &c., "upon every person" &c.

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Before, and for the purpose of, making the said rate, the governors and directors met in pursuance of sect. 12 \*of the local Act, to calculate and settle the amounts required for the different purposes to which the rate was, by law, applicable: viz. the relief of the poor, the county rate &c. (see below), and other expenses hereinafter mentioned. At this time, the governors and directors were engaged in law proceedings for the purpose of contesting the validity of the Poor Law Commissioners' orders above mentioned for and relating to the union of the above mentioned district with other places: and, amongst other items of estimated expenditure from the proceeds of the intended rate, the sum of 700%. was calculated by the governors and directors to be required for law expenses in relation thereto. At the said meeting, 3,679l. was calculated as the sum which would be required for the relief of the The amounts so settled and ascertained were submitted to a meeting of the inhabitants pursuant to sect. 13 of the local Act; and they made the assessment before mentioned for raising the sums required for the purposes aforesaid.

The amount of the rate, supposing the whole collected, was 6,799l. 4s. 6d. The total amount produced by the rate was 6,246l. 13s. 3d.; of which sum the governors and directors appropriated, for the purpose of being paid over to the guardians

of the said Holborn Union for the relief of the poor in the district of the said governors and directors, the said sum of 3,679l. so calculated, &c. as aforesaid; and the residue they appropriated and applied to the other purposes before mentioned: viz. to the police rate, the county rate, the payment of part of the principal and interest and annuities in respect of the debts charged upon the rates made under the said local Act, and salaries to officers, and other expenses attending the carrying of the said local Act into execution, \*and law charges, such as appeals against rates and the like, but chiefly in reference to the said litigation with the Poor Law Commissioners. Various sums had been required of the governors and directors by the guardians of the Holborn Union for the relief of the poor, and expenses of the workhouse: these sums were not paid when demanded, by reason of the said litigation, but were paid on its conclusion, and before the mandamus issued.

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After the issuing of the mandamus, and before the return, viz. July 23rd, 1839, the said J. H. Mitchiner, who had been, on July 28th, 1836, chosen and appointed auditor for the parishes and unions mentioned in the order of July 7th, 1836, including the Holborn Union, except St. Pancras, and who continued to hold and execute such office, attended at the workhouse of the said part of the parish of St. Andrew &c. and St. George the Martyr, for the purpose of auditing the accounts thereof, due notice having been given to the said governors and directors and their said collectors; "and they were duly required to produce to the said J. H. M. a full and distinct account of all moneys, matters and things committed to their charge, or received, held or expended by them, on behalf of the said parishes, so far as related to the moneys assessed for the relief of the poor." Charles Boydell, as clerk to, and on behalf of, the governors and directors, attended and delivered an account, which was set forth in the case; but the following summary, also given in the case, describes it sufficiently for the purpose of this report.

"The credit side of the above account contains a correct statement of the sums paid by the governors and directors at the times therein mentioned to the guardians \*for the relief of the poor, but contains no account of the other applications of the money raised as above mentioned under the name of poor rate, although considerable sums had, during the period embraced by the account, been expended by the governors and directors for the various other purposes above mentioned, including the law charges before referred

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to. The sums mentioned on the debit side of the account as assessed for the relief of the poor formed the whole amount of the various sums calculated, ascertained and settled by the governors and directors as necessary according to their judgment to be assessed and charged for the relief of the poor as aforesaid under the 12th section of the local Act; but they formed only part of the sums calculated" &c. "by the said governors and directors to be assessed and charged, and which were accordingly assessed and raised by the said inhabitants, under the said local Act, under the name of poor rate, for the various purposes hereinbefore mentioned," including the law charges.

Mitchiner then demanded an account of the entire sums that had been collected under the name of poor rate, and how they had been expended, and required to see the whole poor rate, and the various books relating to it: but the governors and directors refused to give any farther account.

The questions for the opinion of this Court were: 1. "Whether or not the said governors and directors, having, as is admitted by the pleadings, fully accounted to the said auditors under the said local Act of Parliament, are also bound to account to the auditor appointed under the order of the said Poor Law Commissioners under the 46th and 47th sects. of stat. 4 & 5 Will. IV. c. 76."

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2. If they are bound so to account, "whether or not the account rendered by the said C. Boydell on the part of the said governors and directors as above mentioned is a sufficient account within the meaning of the said sections, so as to entitle the defendants to have the verdict entered for them on the second of the above issues."

The mandamus, return and pleadings, the local Act, and the before mentioned orders of the Commissioners, were to be considered as part of the case.

The case was argued last Term (1).

### Tomlinson for the Crown:

First, the account rendered to the auditors under the local Act furnishes no answer to this writ. Stat. 4 & 5 Will. IV. c. 76, s. 47, requires the officers there named to account to their own superiors, a final account being, however, demandable by the auditor who shall have been appointed, under sect. 46, by the Poor Law Commissioners. If the governors and directors, now defendants, are

<sup>(1)</sup> April 27th, 1844. Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

exempt from such audit, it must be by some special provision. The exemption might with some reason be claimed if the local Act created GOVERNORS an auditor having all the powers which are to be exercised in OF ANDREW, discharge of that office under the order of the Commissioners: but the officers appointed under stat. 6 Geo. IV. c. clxxv. are not such auditors.

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Erle, contrà :

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The reasons assigned for vesting the power of audit in the Poor Law Commissioner to the exclusion of the local ones are insufficient. It is argued that the decision of the poor law auditor is preferable, because final, and therefore efficient: but his allowance or disallowance is subject to review at the Petty Sessions: Reg. v. Fouch (1), Reg. v. Earl of Dartmouth (2), stat. 4 & \*5 Will. IV. c. 76, s. 89. The investigation before local auditors, elected by and representing the parishioners, is a regular and convenient course, and subject to a proper controll by appeal to the Quarter Sessions: it is said that the appeal renders such a proceeding cumbrous, and less effectual than the examination by poor law auditor; but that argument assumes that his judgment will always be satisfactory.

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(PATTESON, J.: Does the local Act give costs to the parish auditors on appeal?)

They may have them, under sect. 69. In sect. 47 of stat. 4 & 5 Will. IV. c. 76, which expressly provides for the taking of an account, the object principally in view is that there shall be an account every quarter of a year; and it is contemplated that, for the purpose of such account, there shall be, in every parish or union, some auditor; but the clause does not profess to make new regulations for the appointment of them. The argument for the Crown requires that the word "auditors" should be taken to mean auditors armed with certain exclusive authorities; a construction not warranted by the words, and opposed by the cases just cited. The power of controul given by sects. 15 and 21 may be fully exercised without superseding the local auditors. The words of sect. 46 are certainly very large, and enable the Commissioners to appoint officers for the purpose, among others, of auditing accounts, and to define their duties: but this clause must be taken in conjunction with sect. 47; and, if the requisitions of the latter clause

(1) 57 R. R. 684 (2 Q. B. 308).

(2) 5 Q. B. p. 878.

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may have been fully complied with by the audit which has here taken place, the enactment of sect. 46 cannot of itself render that compliance insufficient. Under sect. 47 the return is an answer to the writ.

[ 95 ] Tomlinson, in reply.

Cur. adv. rult.

LORD DENMAN, Ch. J., in this Term (June 8th), delivered the judgment of the Court:

There were two questions in this case proposed for our con-1. Whether the defendants, having accounted to the auditors under the local Act, 6 Geo. IV. c. clxxv., were also bound to account to the auditor appointed under the order of the Poor Law Commissioners: and 2. Whether, if they were bound to account to such auditor, the account rendered by them as stated in the case is sufficient.

With respect to the first of these questions, the powers of the

auditors under the local Act are so inadequate to the performance of the duties required of the auditor appointed under the order of the Poor Law Commissioners, having no power to disallow any of the items in the accounts, that we are clearly of opinion that the defendants were bound to account to the latter auditor, though they had already accounted to the \*auditors under the local Act. part of the case was indeed scarcely contested on the part of the defendants, and was in effect settled by the decision of this Court in the case of The Allstonefield Union (1).

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With respect to the second question, it was contended on the part of the defendants that they were not bound to render an account to the auditor appointed under the order of the Poor Law Commissioners of all the money collected by them under the rate denominated "the poor rate," which was partly applicable to other purposes than the relief of the poor; but only of so much of the produce of the rate as was raised for and applied to the purpose of the relief of the poor. The defendants made a rate of 1s.2d. in the pound for the relief, maintenance, lodging and employment of the poor, which by estimation would produce a sum of upwards of 6,000l.; but of this not much more than half was applied, or intended to be applied, to the relief of the poor; the residue was

<sup>(1)</sup> Reg. v. The Poor Law Commissioners, Allstonefield Incorporation, 11 Ad. & E. 558.

applied, and intended to be applied, to the police rate, the county rate, payment of principal and interest due in respect of debts contracted under the authority of the local Act, for salaries, and various expenses attending the carrying the local Act into effect. The defendants did account for so much of the money raised under the rate as was applied, and intended to be applied, to the relief and maintenance of the poor, but objected to account for the residue which was raised for and applied to other purposes: and whether they are bound to do so is in effect the question for our consideration.

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It is not necessary to refer to the local Act, as the question turns entirely upon the Poor Law Amendment Act, and applies indeed to every parish in England where the poor rate is in fact applicable to the payment of the county rate, police rate, or any other expense than the relief and maintenance of the poor.

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By the forty-sixth section of the Poor Law Amendment Act, the Commissioners may direct the guardians of any parish or union to appoint an officer for the examining, auditing, allowing or disallowing of accounts in such parish or union or in united parishes, and may define and specify and direct the execution of the duties of such officer, and the places and limits within which the same shall be performed. In pursuance of this power, the Commissioners did direct the guardians of the Holborn Union, of which the district in question forms a part, to appoint an auditor, whose duties were specified to be (amongst other things) to audit the accounts of the said union, and of the several parishes comprised therein, at proper times; and to examine whether the expenditure in all cases was such as might lawfully be made, and to strike out such payments and charges as were not authorized by some provision of the law, or the orders of the Commissioners.

By the forty-seventh section of the Poor Law Amendment Act, every person having the collection, receipt or distribution of the moneys assessed for the relief of the poor in any parish or union, or holding or accountable for any balance relating to the relief of the poor, or the collection or distribution of the poor rate of any parish or union, shall, where the orders of the Commissioners shall have come in force, as often as the said orders shall direct, make and render to the guardians, \*auditors or such other persons as by virtue of any statute or custom, or of the said orders, may be appointed to examine, audit, allow or disallow such accounts, a full and distinct account in writing of all moneys, matters and things

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committed to their charge, or received, held or expended by them on behalf of any such parish or union; and all balances due from any person having the controul and distribution of the poor rate, or accountable for such balances, may be recovered in the same manner as any penalties are recoverable under that Act.

Two things are observable in this section: first, that the accounts are to be rendered to a person appointed either by statute, custom or the order of the Poor Law Commissioners to examine, audit, allow or disallow such accounts; and, secondly, that the account is to be of all moneys, matters and things committed to their charge, or received, held or expended by them on behalf of the parish or union; and the balance may be recovered under the Act.

The auditors under the local Act do not, as already observed, possess the powers required for an auditor under this section: they have no power to disallow the accounts; but the auditor appointed under the order of the Commissioners does possess the power, and is therefore the person to whom the accounts should be rendered under the terms of the forty-seventh section.

With respect to the accounts themselves, the terms of the forty-sixth and forty-seventh sections of the Act include all moneys held by the parties accounting on behalf of the parish or union, and would therefore apply to all the money raised by the poor rate: and it is also to be observed that, in the description of the persons \*who are to account, given at the early part of the forty-seventh section, persons holding or accountable for any money or balance relating to the relief of the poor, or the collection or distribution of the poor rate, are mentioned.

It appears to us, therefore, that by the terms of the forty-sixth and forty-seventh sections of the Poor Law Amendment Act, applied to this case, the defendants were bound to account to the auditor appointed under the order of the Poor Law Commissioners, not only for so much of the money raised by the poor rate as was raised for and applied to the relief and maintenance of the poor, but for the whole amount of the money raised by the poor rate; and that the auditor may insist upon ascertaining the amount of the balance of the whole rate in the hands of the accountants. There is but one rate levied, and that professedly for the relief, maintenance, lodging and employment of the poor: and, though the inquiry into the mode of disposing of the proceeds of the rate may introduce matters foreign to the direct and avowed object of the rate, this is but a necessary incident in the inquiry, and seems

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to have been contemplated by the Legislature when a remedy is provided for the recovery of the balance in the hands of the accountant, obviously meaning the balance of the whole rate levied for the relief, maintenance, lodging and employment of the poor.

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We are, therefore, of opinion that the verdict entered for the prosecutor should stand.

Verdict to stand.

# DOE D. LORD ANGLESEA v. CHURCHWARDENS OF RUGELEY.

1814. May 28.

(6 Q. B. 107-119; S. C. 13 L. J. M. C. 137; 8 Jur. 615.)

Land was demised to trustees for parish R., they covenanting to build a workhouse thereon, and to use, occupy, possess and enjoy the premises for the sole use, maintenance and support of the poor of R., and not to convert the building or the land, or employ the profits thereof, to any other use, intent or purpose whatsoever. Proviso for re-entry on breach of the covenant.

The house was built, and, together with the land, used agreeably to the covenant. Afterwards the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), passed; and the Poor Law Commissioners incorporated parish R. in a union, and removed all the paupers to the union workhouse. The workhouse of R. became uninhabited, and was locked up; and the land was let at a rack rent, which was applied in aid of the poor rates. On ejectment brought (three years afterwards) for breach of the covenant,

Held, that no breach of the covenant appeared: but semble that a breach caused by the compulsory operation of the statute would have been thereby excused (1).

By consent, and the order of a Judge (December, 1843), a special case was stated in this cause, for the opinion of the Court.

The case set out an indenture, dated 31st August, 1778, between Henry, Lord Paget, of the one part, and certain trustees on behalf of the inhabitants and parishioners of the parish of Rugeley in Staffordshire, of the other part. After reciting that the maintenance and support of the poor of that parish had been increased, and the burden thereof had become grievous &c., which had in a great measure arisen from the want of a proper house for the reception of the poor, and that many of the inhabitants had petitioned Lord Paget, setting forth the above grievance, and requesting him to grant them eleven acres of land on his chase of Cannock Wood to answer the above purpose, it was witnessed that, for the considerations aforesaid, and in consideration of the rents, covenants and agreements after mentioned, Lord Paget demised to the trustees, their executors, &c., all that tract or parcel of land

<sup>(1)</sup> Baily v. De Crespigny (1869) L. R. 4 Q. B. 180, 38 L. J. Q. B. 98.

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situate in the parish aforesaid, in and upon the chase of Cannock Wood, in a place there called &c., containing eleven acres of land, abutting \*&c.; habendum to the trustees, their executors, &c., from March 25th, 1778, for one thousand years, upon trust as aforesaid, vielding &c. to Lord Paget, his heirs, &c., a yearly rent of 5s.; which rent the trustees, for themselves, their joint and several heirs, executors, &c., covenanted to Lord Paget, his heirs, &c., to pay at the days named. The trustees further covenanted that they, some or one of them, "shall and will, on or before the 24th day of June next ensuing the date hereof, build, or cause to be built, a house upon some part of the hereby demised premises for the reception of the poor people that become chargeable to the said parish of Rugeley, and shall and will, during the continuance of these presents, use, occupy, possess and enjoy the hereby demised premises, and every part thereof, for the sole use, maintenance and support of the poor of Rugeley aforesaid, according to the true intent and meaning of the parties hereto, and shall not convert the aforesaid intended building, or the land hereby demised. or employ the profits thereof, to any other use, intent or purpose whatsoever." Proviso for re-entry if the rent should be behind &c., or if the trustees, their executors, &c., should without license sell, assign, transfer or otherwise part with their or any of their estates. interest or term of or in the premises or any part thereof, or if they or any of them, their or any of their heirs, executors, &c., "do not in all things well and truly observe, perform, fulfil and keep all and singular and every the covenants herein contained." Covenant for quiet enjoyment.

This lease was duly executed: and, within the time prescribed in the lease, a workhouse was erected on the demised land, partly by subscription, and partly at the cost of the inhabitants; and the eleven acres of land \*were inclosed and subdivided by fences and cultivation. From that time until after the day on which the order of the Poor Law Commissioners hereinafter mentioned came into operation, the workhouse so built was inhabited by paupers under the superintendence of a governor, who resided on the premises: and the land became beneficial to the parish by furnishing employment to paupers, who cultivated it under the management of the churchwardens and overseers of the poor for the time being. From the date of the lease until the time last mentioned, the parish officers, by the permission of the lessees, exercised the sole control over the property on behalf of the parish, and paid the rent reserved by the

lease to the lessor or his representatives up to 25th March, 1839, and have been ever since ready and have offered to pay the same as it has become due, according to the terms of the lease.

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By an order of the Poor Law Commissioners for England and Wales, bearing date 25th November, 1836, the Commissioners ordered and declared that certain parishes, &c., among which was the parish of Rugeley aforesaid, should, on 21st December then next, be, and thenceforth should remain, united for the administration of the law for the relief of the poor, by the name of the Lichfield Union, and should contribute and be assessed to a common fund for purchasing, building, hiring or providing, altering or enlarging, any workhouse or other place of reception and relief of the poor of such parishes &c., or for the purchase of any lands or tenements, under and by virtue of the provisions of the said Act, of or for such union, and for the future upholding &c. of such workhouses or places.

After the day on which the above order came into operation, until May, 1840, the said property was, under \*the controul and by the sanction of the proper authorities in that behalf, used for the poor of the union as it had previously been by the poor of the parish. In May, 1840, all the poor then upon the said property were, by order of the proper and competent authorities, removed therefrom to a workhouse which had been built and provided at Lichfield for the said union. Since that period all the poor of the union have, by order of the proper authorities, been supported in the workhouse at Lichfield: and the workhouse at Rugeley has been in consequence uninhabited and locked up. A garden attached to it, and the rest of the land demised, have been and are in the possession of two several tenants at a rack rent under the churchwardens and overseers of the parish; which rent has been and is applied in aid of the poor rates of the parish.

The lessor of the plaintiff is heir-at-law and legal representative of the grantor of the lease.

The question for the opinion of the Court was whether, under the above circumstances, the lessor of the plaintiff has a right to re-enter by virtue of the proviso in the lease of 1778. The parties agreed that, at the request of either, the case might be turned into a special verdict; the record, for such purpose, to be made up, by consent, in such manner as should be necessary.

The case was argued last Easter Term (1).

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<sup>(1)</sup> April 26th. Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

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Whateley, for the plaintiff:

The contract of the defendants under this lease has not been kept; and the reversioner may re-enter. The lessor, who had the jus disponendi, clearly intended that the land should be used for the purposes of a workhouse, and not to aid \*the poor rate in other ways. Lord Tenterden says, in Doe d. Davis v. Elsam (1): "I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts;" that is, "according to fair and obvious construction, without favour to either side."

(Patteson, J.: The paupers have been removed from the workhouse by compulsion of law.)

In Lucy v. Levington (2), cited 2 Bac. Abr. 161 (3), Conditions (Q) 2, the defendant covenanted with J. S. to levy a fine, and that J. S. should enjoy the lands against all claiming under V.: in an action on the covenant it was alleged that persons claiming under V. entered upon J. S.: and the defendant pleaded that at the time of the covenant he had good title by virtue of certain fines, but that an Act of Parliament passed, making and declaring the fines void and declaring the claimants under V. entitled, by reason whereof they entered; and this was held no defence. Here, if the premises can no longer be occupied as a poor house, they ought to return to the lessor.

#### J. W. Smith, contrà :

First, the covenant has not been broken: secondly, if it has, the breach being caused by an Act of Parliament, there is no forfeiture.

1. The words of the covenant, "shall" "use, occupy, possess and enjoy the hereby demised premises" "for the sole use, maintenance and support of the poor of Rugeley," are explained by the negative ones that follow, "and shall not convert the aforesaid intended building, or the land hereby demised, or employ the \*profits thereof, to any other use;" which show that the restriction was not meant to be literally that which seems expressed in the first part of the clause. As to the workhouse, it has not been converted "to any other use:" the churchwardens and overseers retain the controul over it; and the poor, or part of them, may at any time be brought back. As to the land, it is made available for the purposes of the

- (1) 31 R. R. 729 (Moo. & Mal. 189). (3) 7th ed.
- (2) 1 Ventr. 175.

lease as nearly as the circumstances permit. \* \* Where a condition is not strictly fulfilled, non-performance is excused "if the condition be performed in substance," or "as near the intent of the condition as can be: "Com. Dig. Condition (L. 1). 2. If. however, the acts done are contrary to the covenant, the legal compulsion is an excuse. "Where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant: so if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed: " Brewster v. Kitchell (1). It may also be collected from Com. Dig. Condition (D. 1), (L. 13), and 4 Bac. Abr. \*Leases and Terms for Years (T. 2) (2), that a forfeiture does not take place where performance of the covenant is made impossible by Act of Parliament. Lucy v. Levington (3) was decided before Brewster v. Kitchell (1); and the defendant Levington had pleaded that, before the Act of Parliament, he had a good and indefeasible title by virtue of certain fines, which fines the Act (13 Car. II.) declared void, as having been extorted by armed force; and HALE, Ch. J. said, in his judgment, "nor has the defendant reason to complain, for the act was made because of his own fraud and force." Doe d. Lord Grantley v. Butcher (4) is a direct authority for the defendant on this point.

Whateley, in reply:

The law laid down in *Brewster* v. *Kitchell* (1) does not apply to the case where there is a covenant for re-entry if a condition be broken; and no case has been cited where such a covenant was held not to operate when the express terms of a demise were infringed, as in this instance.

(J. W. Smith referred to Doe d. Goodbehere v. Beran (5) and Doe d. Mitchinson v. Carter (6).)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the Court:

This was an ejectment to recover possession of a building and land demised to trustees for the parish of Rugeley, on the ground

- (1) 1 Salk. 198.
- (2) See pp. 885, 887.
- (3) 1 Ventr. 175.
- (4) See p. 310, note (3), post.
- (5) 16 R. R. 293 (3 M. & S. 353).
- (6) 4 R. R. 586 (8 T. R. 57). See
- S. C. 8 T. R. 300.

Dond, Lond Anglesea r. Churchwardens of Rugeley.

[ \*113 ]

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[\*114]

of a forfeiture by reason of \*breach of a covenant, contained in the lease, that the lessees should use, occupy, possess and enjoy the demised premises for the sole use, maintenance, and support of the poor of Rugeley, and should not convert the building or the land demised, or the profits thereof, to any other use, intent or purpose whatsoever.

Until the month of May, 1840, the building was used as the workhouse, and the land as a garden, which was cultivated by the paupers: but, at that time, the paupers were removed to a union workhouse at Lichfield in pursuance of the order of the Poor Law Commissioners; and the workhouse at Rugeley has been shut up since that time, and the garden and land have been let at a rent which has been applied in aid of the poor rate. This is the alleged breach of covenant by which it was contended that the lease was forfeited.

But we are of opinion that there has not been any breach of the covenant, but that it has been substantially performed. The premises never have been used for any other purpose than that of the maintenance and support of the poor of Rugeley; and, though the orders of the Commissioners have occasioned for a time a cessation of the actual occupation of the premises by the paupers, such an occupation, either by casual poor or otherwise, may at any time be resumed. What was the precise date of the breach of covenant? To this question no satisfactory answer was given upon the argument. But, even if the condition were not performed, it appears to us that the non-performance would in this case be excused, as being by act of law, and involuntary on the part of the lessees; and the cases cited in the argument, and to be found in Bac. Ab. tit. Conditions (Q) 2 (1), \*Com. Dig. tit. Condition (L. 1), and the case of Brewster v. Kitchell (2), support this view of the case

[ \*115]

Our judgment, therefore, is for the defendants.

(1) Vol. 4, p. 161, &c.

(2) 1 Salk. 198.

1840. May 1. [ 115, n. ] (3) DOE d. LORD GRANTLEY AND SHRUBB v. BUTCHER AND OTHERS.

Land was demised for 1,000 years by indenture (A.D. 1793) to A. and B., the latter described as visitor and guardian of the poor of the parish of C., their successors and assigns, under stat. 22 Geo. III. Judgment for defendants (3).

c. 83 (Gilbert's Act), for the purpose of erecting a poorhouse thereon, and occupying and cultivating the same for the use and benefit of such poorhouse, and of the poor of C. and such other parishes as should be united therewith for the purposes of the Act. Proviso for re-entry if C. and all the other parishes which should or might at any time be so united should of themselves

# REG. v. DENIS JOHN BLAKE AND JOHN CHAMBERLAIN TYE (1).

(6 Q. B. 126-140; S. C. 13 L. J. M. C. 131; 8 Jur. 145, 666.)

1844. Jan. 25, 27. May 30.

[ 126 ]

A count for conspiracy charged that T. and B. conspired to cause certain goods which had been and were imported and brought into the port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to the Queen, to be carried away from the port and delivered to the owners without payment of a great part of the duties, with intent thereby to defraud the Queen; not further describing the goods or the means of effecting the objects of the conspiracy. Held sufficient, on motion in arrest of judgment.

T. did not appear; B. pleaded Not guilty. On his trial it was proved that T. was agent for the importer of the goods, B. a landing waiter at the Custom House; that it was T.'s duty (under stat. 3 & 4 Will. IV. c. 52, s. 24) to make an entry describing the quantity &c. of the goods; that a copy of the entry was delivered to B., who was to compare this copy with

(1) Cited in Mulcahy v. Reg. (1868) L. R. 3 H. L. 321.—A. C.

discontinue to adopt the provisions of the statute. Further proviso that, if, during this demise, the Legislature should repeal Gilbert's Act, so that the poor of the several parishes should no longer be permitted to remain under the care of the visitor and guardians of such parishes, it should be lawful for the visitor and guardians, their successors and assigns, yielding up the land to the lessors, to pull down the said poorhouse and carry away the materials.

The house was built; and C. and other parishes adopted the provisions of the Act; and C. continued to follow them till the making of the after-mentioned order: but the other parishes secoded from the union. In 1836, the Poor Law Commissioners incorporated parish C. in the Hambledon Union, and ordered all the paupers to be removed to the union workhouse; after which no paupers were received into the poorhouse of C. but persons requiring only out-door relief; and the parish officers issued a notice proposing to let part of the house and the land.

Held, no forfeiture under the first proviso.

EJECTMENT for messuages, land, &c., in the parish of Cranley, Surrey.

Demise, 1st October, 1837. By consent, and order of a Judge, a special case was stated for the opinion of this Court.

The case stated an indenture, dated 19th September, 1793, made between Grace, Lady Grantley, relict of the late Fletcher, Lord Grantley, lady of the manor of East Bramley, Surrey, and William, Lord Grantley, heir-atlaw of the late Lord, of the one part, "and Michael King, of Cranley, Surrey, yeoman, and John Tickner, of Cranley aforesaid, yeoman, visitor and guardian of the poor of the parish of Cranley aforesaid under and by virtue of an Act" &c., "made" &c. (22 Geo. III. c. 83), "of the other part;" whereby the first-mentioned parties demised "to the said M. King and J. Tickner, their successors and assigns," a piece of ground, part of the waste of the manor, situate &c., "for the purpose of erecting a poorhouse or workhouse or other buildings thereon, and occupying, cultivating and improving the same for the use and benefit of such poorhouse and the poor persons within the said parish, and such other parish or parishes as should be united therewith for the purposes of the above \*mentioned Act of Parliament." Habendum &c. from 25th March then last for 1,000 years, at the yearly rent of 12s. Proviso, "that, if and when

[ \*116, n. ]

REG. r. Blake. the goods, and, if they corresponded, to write "correct" on T.'s entry; whereupon T. would receive the goods on payment of the duty according to his entry. It was further proved that T.'s entry was marked "correct" by B., and corresponded with B.'s copy; that payment was made according to the quantity there described, and that the goods were delivered to T. Evidence was then offered of an entry by T., in his day book, of the charge made by him on the importer, showing that T. charged as for duty paid on a larger quantity than appeared by the entry and copy before mentioned: Held admissible evidence against B.

It was proved that B. received the proceeds of a cheque drawn by T. after the goods were passed. The counterfoil of this cheque was offered in evidence, on which an account was written by T., showing, as was suggested, that the cheque was drawn for half the aggregate proceeds of several transactions, one of which corresponded in amount with the difference between the duty paid and the duty really due on the above goods: Held, not evidence against B.

Information by the Attorney-General for a misdemeanor.

The first count charged that the defendants, wickedly &c., intending

the said parish of Cranley, and all other the parish or parishes which shall or may at any time hereafter during this demise become united therewith for the purposes aforesaid, shall of themselves discontinue to adopt the provisions of the aforesaid statute, that then and from thenceforth the said term and estate hereby granted shall cease," and the lessors, and such other person as shall then be entitled, may re-enter. Further proviso, and covenant by the lessors, "that, if the Legislature of this kingdom shall at any time hereafter during the continuance of this demise or lease repeal the said Act of Parliament or statute, so that the poor of the said parish of Cranley, and of such other parish or parishes as may become united therewith for the purposes above mentioned, shall no longer be permitted to continue under the care and management of the visitor and guardians of such parishes, that then it shall and may be lawful to and for the said visitor and guardians, their successors or assigns, yielding and surrendering the said piece of ground to the said Grace, Lady Grantley, William, Lord Grantley, or such other person" &c., "to pull down, carry and take away the said poorhouse or workhouse, and all the buildings that shall be erected or built on the said

piece or parcel of ground, and to sell and dispose of the materials thereof, any thing herein contained " &c. "notwithstanding."

The case further stated that, soon after the execution of the indenture. the parish of Cranley built a workhouse on part of the land so demised to the visitor and guardian of the poor of the said parish, and also took in and enclosed altogether eleven acres of land; which house and land were the premises claimed in this action. Subsequently, other parishes united themselves to Cranley, and adopted the provisions of stat. 22 Geo. III. These parishes afterwards c. 83. seceded from the union: but Cranley continued to adopt the provisions of the statute; and its poor remained under the care of a visitor, guardian and other officers elected in conformity thereto, till 1836.

The Poor Law Commissioners, by an order, dated February 22nd, 1836, declared and ordered that Cranley should be united with certain other parishes to form the Hambledon union, and that guardians should be elected for such union. During 1835 and 1836, a poorhouse for that union was built in the parish of Hambledon; and, under the Poor Law Amendment Act, the parish officers of Cranley were directed to remove the poor of that

to cheat and defraud the Queen, heretofore, to wit on &c., at &c., "did unlawfully and fraudulently conspire, combine, confederate and

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[117, n.]

parish from the workhouse there to the said poorhouse of the Hambledon union; and accordingly all the paupers who, until such direction, were under the care of the said visitor &c. were, before the day of the demise in the declaration, removed to the Hambledon poorhouse. Between the time of such removal and the day of the demise in the declaration, the only paupers received into the Cranley workhouse were persons requiring out-door relief only; and such paupers alone continue in that workhouse. receiving such out-door relief, and no other.

After the formation of the Hambledon union, the parish of Cranley issued a notice, proposing to let "the under part of the workhouse, not required for the use of the paupers," with the outbuildings &c. and eleven acres of arable and meadow land. Tenders, sealed, to be addressed to the churchwardens, and delivered at the vestry room &c.

Before the day of the demise laid in the declaration. Lord Grantley, being then the lord of the manor and entitled to the wastes, demanded possession.

The question for the opinion of this Court was, whether Lord Grantley was entitled to recover the whole or any part of the premises. Judgment was to be entered (as more particularly stated in the case) according to the decision of the Court.

In Easter Term, 1840 (May 1st: before Lord Denman, Ch. J., Little-dale, Patteson and Coleridge, JJ.),

Platt, for the plaintiff, contended that, by the removal of the paupers and the changed mode of using the premises, a forfeiture had arisen.

(COLERIDGE, J.: You give no force to the words "shall of themselves discontinue."

LORD DENMAN, Ch. J.: Those words are used in the demise; and then

comes an Act of Parliament under which the paupers are compulsorily removed.)

The facts show that the parishioners of Cranley did "of themselves discontinue" to adopt the provisions of Gilbert's Act.

(COLERIDGE, J.: The other parishes withdrew; Cranley continued.)

Gilbert's Act was unrepealed; but Cranley could not any longer adopt its provisions after the order of the Commissioners.

(PATTESON, J.: If it had been repealed, you would have had no right of entry under the first proviso.

COLERIDGE, J.: The second proviso would, in that case, have entitled them to carry away the materials of the buildings. Your argument places them in a worse position than if that had happened.)

Lodging their out-door paupers in the house was an alteration which they had no right by the lease to make.

(LOED DENMAN, Ch. J.: It was not properly discontinuing to adopt the provisions of the statute.)

If it could be held that the term was not forfeited, a question would arise who could have it. The premises are not vested in the officers of the single parish of Cranley, within stat. 59 Geo. III. c. 12, s. 17.

(PATTESON, J.: It is clear that the parish of Cranley, as far as regarded itself, adopted the provisions of Gilbert's Act: and by that Act (s. 21) the visitor and guardian of the single parish might hold the premises.)

Their functions would cease when stat. 4 & 5 Will. IV. c. 76, came into operation.

(PATTESON, J.: It does not appear whether a dissolution of the first REG. V. BLAKE. [ \*127 ] agree together, and with divers other persons" &c., "to \*cause and procure certain goods, wares and merchandizes, which had been and were theretofore imported and brought into the port of

union was consented to according to stat. 4 & 5 Will. IV. c. 76, s. 32.

COLERIDGE, J.: The other parishes seceded. Cranley could not help their discontinuing to act as a union. Then would not the persons in Cranley who took as parties to the demise still be tenants, at least from year to year?

[ \*118, n. ]

LORD DENMAN, Ch. J.: \*Does the case state that they are still living?)

Nothing is said as to that. The indenture was executed in 1793.

#### Pashley, contrà:

The parishioners of Cranley did not "of themselves discontinue." other parishes did so discontinue, but this did not, the case is not within the words of the proviso. And, even if there was a discontinuance by Cranley within the meaning of the proviso, the Act was one which the Commissioners had, by statute, an absolute power to enforce: Rex v. The Poor Law Commissioners, In re Newport Union; † and, if a condition is broken under compulsion of a statutory authority subsequent to the making of the covenant, no forfeiture ensues. It has been so held in the case of an assignment by operation of law: note (d) to Duppa v. Mayo, t and Doe d. Mitchinson v. Carter, § and other authorities there cited. If a grant is made on a condition which becomes contrary to law, the grant is absolute: Abbot of Westminster v. Clerke, || Brewster v. Kitchell, ¶ Atkinson v. Ritchie. \*\* The authorities exercised under Gilbert's Act were not revoked by the passing of stat. 4 & 5 Will. IV. c. 76. (He was then stopped by the COURT.)

#### LORD DENMAN, Ch. J.:

This case is put for the plaintiff simply on the ground of forfeiture. Now I think the proceeding on the part of the parish is not, strictly, within the clause of forfeiture. And. supposing that the union under Gilbert's Act was dissolved, that was in 1836. The occupation under the demise has continued ever since. We must presume that the parties who originally took are still living. It was for the plaintiff to make out a case entitling him to recover; and, he not doing so, the defendants are entitled to judgment.

LITTLEDALE, J. had left the Court.

#### PATTESON, J.:

The second proviso is, that, if the Legislature shall repeal Gilbert's Act. so that the poor of Cranley and the other parishes shall no longer be permitted to continue under the visitor and guardians of such parishes, it shall be lawful for the visitor and guardians, yielding up the ground to the lessors, to take away the materials of the workhouse: but it is not said that they shall do so: and the case falls within this rather than the first proviso. What the consequence may be, we are not bound to consider. The defendants are entitled to judgment.

COLERIDGE, J. concurred.

Platt then asked leave to have the case amended, saying that the parties

<sup>† 6</sup> Ad. & El. 54.

<sup>† 1</sup> Wm. Saund. 288 b, 6th ed.

<sup>§ 4</sup> R. R. 586 (8 T. R. 57).

<sup>||</sup> Dyer, 26 b, 28 b, pl. 186.

<sup>¶ 1</sup> Salk. 198; S. C. 1 Ld. Ray. 317, 321.

<sup>\*\* 10</sup> R. R. 372 (10 East, 530, 534, 535).

London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the Queen, to be taken and carried away from the said port, and to be delivered to the respective owners thereof without payment to our said lady the Queen of a great part of the duties of customs so then and there due and payable thereon as aforesaid; with intent thereby then and there to defraud our said lady the Queen in her said revenue of the customs. In contempt "&c.

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The second count charged the defendants with conspiring, "by false and fraudulent representations and statements of and concerning the numbers, measures, weights and values, respectively, of certain foreign goods, wares and merchandizes, which had been and were theretofore imported and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the Queen according to the numbers, measures, weights and values, respectively, of the said foreign goods, wares and merchandizes respectively, to deprive and defraud our said lady the Queen of a great part of the said duties of customs so due as aforesaid. In contempt" &c.

The third count charged the defendants with having conspired, "by fraudulently and unlawfully omitting and neglecting to make and give a true, full and correct declaration and description of the particulars of the numbers, measures, weights and values, respectively, of certain foreign goods, wares and merchandizes, respectively, which had been and were theretofore imported \*and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the Queen according to the numbers, measures, weights and values, respectively, of the said foreign goods," &c., "respectively, to deprive and defraud our said lady the Queen of a great part of the said duties of customs so due as aforesaid. In contempt" &c.

[ \*128 ]

The fourth count described the conspiracy to be "to cheat and

wished to have the opinion of the Court as to the title.

The COURT gave leave to restate the case, if the parties could agree.

Judgment for defendants, nisi.

The case was not restated. Lord

Grantley gave up the action, paid costs, and bought the property of the parish. (So stated by J. W. Smith, in arguing the case of Doe d. Lord Anglesea v. Churchwardens of Rugeley (ante, p. 305), on the authority of Lumley, Assistant Secretary of the Poor Law Commissioners.)

[ 119, n. ]

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[ \*129 ]

defraud our said lady the Queen of divers large sums of money then being due and payable to our said lady the Queen in respect of the duties of customs of this realm. In contempt "&c.

Tye did not appear: Blake pleaded Not guilty.

On the trial, before Lord Denman, Ch. J., at the London sittings after Michaelmas Term, 1843, it appeared that Tye was a Customhouse agent, and Blake a landing waiter. Evidence was given of the practice in the Custom-house on sight entries, made under stat. 3 & 4 Will. IV. c. 52 (1). It appeared that the importer, or his agent, \*on making the declaration necessary for a sight entry, and giving a description of the goods, sufficient for their identification, receives an order for their being landed: that afterwards the importer, or his agent, makes out what is called the Perfect Entry, which should contain the particulars of the goods necessary to determine the amount of duty. The Perfect Entry is left at the Custom-house; and the particulars are there copied into what is called a Blue Book, which is then delivered from the Customhouse to the landing waiter who is to examine the goods. landing waiter examines the goods in the presence of the importer or his agent; and, if he finds that the particulars correspond with those in the Blue Book, he writes the word "Correct," with his initials, across the Perfect Entry; and the goods are afterwards delivered to the importer upon payment of the duties so ascertained.

It was shown that some goods were imported, and that Tye acted as agent for the importer and obtained a sight entry: Blake acted as landing waiter. The goods were passed to Tye, the duty having

(1) "For the general regulations of the customs." Sect. 24 enacts "That if the importer of any goods, or his agent after full conference with him. shall declare before the collector or controller that he cannot for want of full information make a full or perfect entry of such goods, and shall make and subscribe a declaration to the truth thereof, it shall be lawful for the collector and controller to receive an entry by bill of sight for the packages or parcels of such goods by the best description which can be given, and to grant a warrant thereupon, in order that the same may be provisionally landed, and may be seen and examined by such importer, in presence of the proper officers; and within three days after any goods shall have

been so landed, the importer shall make a full or perfect entry thereof, and shall either pay down all duties which shall be due and pavable upon such goods, or shall duly warehouse the same, according to the purport of the full or perfect entry or entries so made for such goods, or for the several parts or sorts thereof: provided always, that if when full or perfect entry be at any time made for any goods provisionally landed as aforesaid by bill of sight, such entry shall not be made in manner hereinbefore required for the due landing of goods, such goods shall be deemed to be goods landed without due entry thereof, and shall be subject to the like forfeiture accordingly." pealed 8 & 9 Vict, c. 84, s. 2.)

been paid on the Perfect Entry made out by Tye, which was produced in evidence, and shown to correspond with the entry in the Blue Book, also produced. It was then proposed, on the part of the prosecution, to put in Tye's Day Book, and to show, by Tye's own entry therein, that the quantity of the goods was much larger than appeared by the Perfect Entry and Blue Book, and that the importer had been charged the duties by Tye on such \*larger amount, and had paid them to him accordingly. For the defendant, it was objected that the entry in Tye's book was not evidence against Blake. The LORD CHIEF JUSTICE, however, received it.

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Evidence was also given to show that a cheque drawn by Tye for a certain sum, and dated after the goods were passed, had been cashed, and the proceeds traced to Blake (1). It was then proposed, on the part of the prosecution, to put in evidence the counterfoil or butt of this cheque, in Tye's cheque book, on which was written an account, showing, as was contended, that the cheque was drawn for a sum amounting to half the profit arising from transactions including the alleged fraud on the revenue, as manifested by the amounts of the several items in that account. To this evidence also an objection was taken, similar to that before mentioned. The Lord Chief Justice received the evidence.

Other evidence was also given, as to the contents of the parcels landed (2).

Verdict: Guilty.

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In Hilary Term (January 25th), 1844,

Cockburn moved for a new trial on the above objections, and also in arrest of judgment:

The information is bad, because it has not the certainty requisite according to the rule laid down by De Grey, Ch. J. in Rex v. Horne (3). "The charge must contain such \*a description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'Guilty' or 'Not guilty' upon the premises delivered to them; and that the Court may see such a definite crime, that they may apply the punishment which the law prescribes. This I take to be what is

[ \*131 ]

(1) The defendant's counsel denied that this tracing had been distinctly made out; but he also argued that, assuming it to be made out, the objection to the evidence was not removed.

(2) Evidence was in fact given of

several transactions: but, as both the objections to the evidence applied to one of them, it is thought sufficient to confine the report to that.

(3) 2 Cowp. 672, 682.

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[ \*133 ]

meant by the different degrees of certainty mentioned in the books." To which it must be added that the indictment ought to be such as to enable the defendant to use the proceeding in support of a plea of auterfois convict or auterfois acquit. Here no description of the goods is given, except that duties were payable upon the importation of them. Some articles may be imported without any duty: this is therefore an attempt to describe goods by drawing an inference of law. The Court ought to judge whether the goods are so liable, and, for that purpose, ought to have brought before it the nature of the goods. \* \*

# [132] LORD DENMAN, Ch. J.:

The charge is for conspiracy to procure imported goods, in respect of which duties were payable, to be delivered to the owners without payment. That is the substance of the first count: the fourth count is in effect the same, and may perhaps be liable to the same objection. I cannot think it necessary to specify the goods. It was matter of evidence, what the goods were to which \*the conspiracy related. The parties might have conspired without knowing what they were: they might have laid their heads together to cheat the Queen of whatever customable goods they could pass. The case is not like that cited, of soliciting a Customhouse officer to neglect his duty. There it was necessary to show that the party solicited was such an officer that the duty was incumbent on him.

I do not feel the smallest doubt that this indictment is good.

# PATTESON, J.:

The first count shows the offence which is charged as clearly as can be done in a case of this kind. As to a future plea of auterjois convict or auterfois acquit, the identity of the offence must be matter of evidence in ninety-nine instances out of a hundred, in the case of charges of conspiracy. We know that a general count for a conspiracy to bring the House of Commons into contempt would be good, though the means were not set forth: and, in such a case, the identity of the offence, if the party were indicted again, must be made matter of evidence.

### WIGHTMAN, J. (1):

I am of the same opinion. In Rex v. Gill (2) the defendants (1) Coloridge, J. was absent. (2) 20 R. R. 407 (2 R. & Ald. 204).

were charged with conspiring by divers false pretences and subtle means and devices to obtain from A. and B. divers large sums of money, and to cheat and defraud them thereof: and it was held that, the gist of the offence being the conspiracy, it was sufficient only to state the act and its object, and not necessary to set out the specific means. Mr. Cockburn's objection would apply to almost every case of conspiracy to defraud a party of goods. It is true that there \*might arise some difficulty, on a plea of auterfois acquit or auterfois convict, from the want of particularity in the indictment. That, in most cases must be supplied by parol evidence: it is very seldom that enough appears on the face of an indictment to enable a defendant to dispense with such proof.

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Rule for arresting judgment refused.

On the other point,

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Cur. adv. vult.

The Court, in the same Term (1), granted a rule nisi for a new trial.

Sir F. Thesiger, Solicitor-General, and W. F. Pollock now showed cause:

First, as to the admissibility of the Day Book. It is true that the declarations and acts of one defendant are not evidence against another until a conspiracy has been proved. But here evidence had been given of a conspiracy between Tye and Blake; for it had been shown that the Perfect Entry made by Tye corresponded with the entry in the Blue Book, confirmed, as correct, by Blake. was mere detail: and it then was competent to the prosecutor to show, by the declaration of Tye, that the representation which he and Blake had combined to make was false. On the motion for the rule several authorities were cited. [They referred to, 1 East's Pl. Cr. 96, Starkie on Evidence (2), 1 Phill. Ev. 477, The Queen's case (3), Rex v. Stone (4), Rex v. Watson (5), Rex v. Salter (6) and Rex v. Hardy (7).] The result of the authorities seems to be that, where the conspiracy charged is of a very general nature (as, for instance, to excite disaffection, or to convey treasonable information), concert in the purpose must be established by evidence before the act or declaration of one party can be admissible as

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- (1) January 27th, 1844.
- (2) See Vol. II. p. 325, &c. (3rd ed.).
- (3) 22 R. R. 678 (2 Brod. & B. 302).
- (4) 3 R. R. 253 (6 T. R. 527).
- (5) 2 Stark. N. P. C. 116, 141.
- (6) 5 Esp. 125.
- (7) 24 How. St. Tr. 199. See pp. 436, 447, 454.

Reg. t. Blake. against the other. Still, in order to establish the fact of that concert, the separate acts of the individuals may be proved for the purpose of showing the existence of a common object. This is the view taken by Coleridge, J. in Reg. v. Murphy (1). And here the entry in the book was not a mere declaration: it accompanied the act of receiving from the importer.

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Next, as to the counterfoil. The account was shown to be connected with Tye's cheque; and the cheque produced money which Blake received. Then the question was, whether the money was so given and received in respect of the imputed fraud: if it was, the payment and receipt were parts of the transaction itself. Now this was properly proved by the entry on the counterfoil, which is not a mere statement, but a calculation performed with a view to, and either accompanied or immediately followed by, the drawing of the cheque, which was a step in carrying the conspiracy into effect.

Cockburn (with whom were Humfrey and Warren), contrù, was stopped by the Court.

# LORD DENMAN, Ch. J.:

I have no doubt as to the first point. The evidence clearly was receivable. The Day Book was evidence of something done in the course of the transaction, and was properly laid before the jury as a step in the proof of the conspiracy.

As to the counterfoil, I felt much doubt at the time of the trial.

The admission of the evidence was, however, pressed for on the part of the prosecution; and I thought that it, perhaps, proved an act necessary to be done, as Mr. Pollock puts it, to carry the conspiracy into effect. But, on consideration, I think that is not so. The conspiracy was fully effected before that was done. The evidence, therefore, is on the same footing as evidence that Tye told some other party that he had paid Blake money on account of the fraud. It resembles the letter of Thelwall which was rejected in Rex v. Hardy (2). \*Of what is it a statement? If we received every statement of a party shown to be a conspirator, we should often find ourselves embarrassed by a party relying upon a statement of his own, to exonerate himself. In Rex v. Watson (3) papers found at the lodgings of one of the conspirators, not on trial, were

<sup>(1) 8</sup> Car. & P. 297, 310,

<sup>(2) 24</sup> How. St. Tr. 447.

<sup>(3) 2</sup> Stark. N. P. C. 140.

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admitted against another conspirator, though not found till after the apprehension of the latter, nor directly proved to have been there before his apprehension. That seems to have been done upon the assumption that the other evidence showed that the lodgings had not been entered in the interval, and because the matter in the papers was closely connected with the alleged conspiracy. The language reported to have been there used by the Court is, perhaps, too general, if read without reference to the particular facts. Those facts took the case out of the rule in Rex v. Hardy (1). But the Court thought that an indorsement, which did not appear to be connected with the general design, was not evidence. The case, therefore, is rather an authority against the admission of this evidence. The evidence then must be rejected, on the principle that a mere statement, made by one conspirator to a third party, or any act of such conspirator not done in pursuance of the conspiracy, is not evidence for or against another conspirator.

### PATTESON, J.:

I entirely agree on both points. As to the first, it is laid down that you must establish the fact of a conspiracy before you can make the act of one the act of all. But you are not bound to bring the parties into each other's presence; the concert may be shown \*by either direct or indirect evidence. The Day Book here was evidence of what was done towards the very acting in concert which was to be proved. It was receivable as a step in the proof of the conspiracy.

As to the counterfoil, it seems to me to have nothing to do with the conspiracy. What is the charge? A conspiracy to defraud the customs. That appears to have been done before the cheque was drawn; the cheque had nothing to do with carrying the conspiracy into effect. The principle in Rex v. Watson (2) is quite in analogy with this decision: and the same distinction was taken in Reg. v. Murphy (3), where my brother Coleridge rejected evidence of what was said after the transaction. Here the evidence offered is of a statement made after the conspiracy was effected.

# WILLIAMS, J.:

I am of the same opinion on both points. As to the Day Book, I agree that it is not necessary that the charge of conspiracy should

(1) 24 How. St. Tr. 865, &c.

(3) 8 Car & P. 305.

(2) 2 Stark. N. P. C. 140.

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[ \*140 ]

be made out per saltum: this cannot be requisite, unless we are prepared to say that nothing can prove a conspiracy except hearing the parties talk together. If this be not necessary, it follows that the existence of a conspiracy may be shown by the detached acts of the individual conspirators. Therefore, the entry made by Tye in his Day Book was admissible, in order to show one act done with the common purpose.

The writing on the counterfoil is, in effect, a declaration by Tye for what purpose he had drawn the cheque, and how the money was to be applied. To what did this relate? To a conspiracy at that time \*completed. In Rex v. Watson (1) the only doubt was whether the interval of time was not so great as to have allowed another party to place the document where it was found.

### COLERIDGE, J.:

I agree with the rest of the Court on both points. As to the first, we have, indeed, not heard Mr. Cockburn; but I feel a very strong persuasion that he would not have convinced me that the Day Book was inadmissible.

As to the counterfoil, it is quite clear that no declaration of Tye can be received in evidence against Blake which was made in Blake's absence, and did not relate to the furtherance of the common object. What then was this statement? It was made by Tye after the common object was effected; and it is suggested merely to have related to the division of the plunder. It is a memorandum, not merely of the cheque drawn, but of a large account containing several items, made out for Tye's own use. How can that be connected with the conspiracy? It is suggested that Blake's receipt of the money connects him with the entry. That may make it more credible that the connection existed; but it still does not bring the case within the rule which makes the declaration of one conspirator evidence against another.

Rule absolute for a new trial.

1844. June 3.

#### DANIEL v. GRACIE.

(6 Q. B. 145-153; S. C. 13 L. J. Q. B. 309; 8 Jur. 708.)

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The proprietor of a house and of a marl pit and brick mine demised the house, by unwritten agreement, to D. from a day named; and it was at the same time agreed between them, without writing, that D. should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter

(1) 2 Stark. N. P. C. 140.

days, 8d. per solid yard for all the marl that he got, and 1s. 8d. per thousand for all the bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time; but they afterwards fell into arrear:

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Held, that the agreement for the marl pit and brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, and for which, therefore, the lessor might distrain.

REPLEVIN. First count for goods taken in a dwelling-house in the parish of Burslem, Staffordshire. Second count for goods taken in a certain close in the same parish, described by abuttals.

Cognizance. As to the first count, for rent due in respect of the dwelling-house.

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As to the second count (except as to the taking of certain of the goods therein mentioned), that plaintiff held and enjoyed a certain marl and slack pit, in and parcel of the close in which &c., as tenant thereof to Richard Edward Creswell, under a demise thereof theretofore made at a certain rent, viz. 8d. for every cubic yard of marl and slack dug and gotten by plaintiff from and out of the said pit, payable quarterly, to wit on &c. (the usual quarter days); and, because a large sum &c., to wit 16l. 16s. 11d., of the rent last aforesaid, for and in respect of divers, to wit 506, cubic square yards of marl and slack dug and gotten by plaintiff from and out of the said pit during the quarter of a year ending 25th December, 1841, and part of another quarter, to wit the quarter then next preceding, became and was on the day and year last aforesaid due &c., defendant, as bailiff to R. E. C., well acknowledges the taking of the said goods &c., the same then being in and upon the said marl and slack pit so being parcel of the said close in which &c., and justly &c.: verification. And, as to the residue of the second count, that plaintiff held and enjoyed a certain brick mine, in and parcel of the close in which &c., as tenant to R. E. C. under a demise thereof theretofore made at a certain rent, viz. the sum of 1s. for every one thousand bricks made and burnt by plaintiff from the said mine, payable quarterly, to wit &c. (the usual quarter days); and, because a large sum &c., to wit 13s. 4d., of the rent last aforesaid, for and in respect of divers, to wit 8,000, bricks made and burnt by plaintiff from the said mine during the quarter of a year ending on 29th September, 1841, became and was on the day and year last aforesaid due &c., defendant, as bailiff of R. E. C., well acknowledges the taking of \*the residue of the goods &c., in and upon the said brick mine in and parcel of the said close &c., and justly &c. Verification.

[ \*147 ]

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The only pleas in bar which it is material to state were: 3. As to the cognizance pleaded to the last count, except as to the taking of the goods in that cognizance excepted, that plaintiff did not hold or enjoy the said marl and slack pit, in and parcel &c., as tenant thereof to R. E. C. under the said supposed demise &c., in manner and form &c.: conclusion to the country. Issue thereon. 5. To the cognizance pleaded to the residue of the last count, that plaintiff did not hold or enjoy the said brick mine, in and parcel &c. (as in the third plea): conclusion to the country. Issue thereon.

On the trial, before Williams, J., at the Staffordshire Summer Assizes, 1848, it appeared that in September, 1840, the plaintiff was occupying a house of which Mr. Creswell was proprietor, and a conversation took place between the plaintiff and Green, Creswell's agent, respecting the future terms of plaintiff's tenancy. Green (who was the principal witness for the defendant) stated that he, on that occasion, agreed, in consequence of some repairs done by plaintiff, that plaintiff should have the house rent-free till the ensuing 12th of November, from which time he was to hold it at a There was a marl and slack pit, then open, near the house: and it was agreed (1), in the same conversation, that plaintiff (who was a potter, dealer in marl, and brickmaker) should take the marl pit, and should pay 8d. per solid yard for all the marl that he got. It was to be paid quarterly, at the four usual quarter days. It was also agreed at \*the same time that plaintiff should take a brick mine, then in work, belonging to Mr. Creswell, at Burslem, and should pay 1s. 8d. per thousand for all bricks made; the payments to take place quarterly. No written agreement was The plaintiff had made payments for the marl pit and brick mine before the arrear in question accrued. It was objected, for the plaintiff, that on this evidence there did not appear, as to the marl pit and brick mine, any demise under which a distress for rent could be made; and that the agreement for the pit and mine had not the certainty requisite in a lease, as to the subject-matter or the time when the enjoyment was to commence, and was, in fact, The learned Judge gave leave to move to enter a a mere licence. verdict for the plaintiff on the third and fifth issues: and a verdict was taken for the defendant on all.

In Michaelmas Term, 1843, E. Yardley moved for a rule to show cause why a verdict should not be entered for the plaintiff on the 3rd and 5th issues, or a new trial had. He cited Doe d. Hanley v.

(1) The witness did not profess to state any precise terms of the agreement.

Wood (1); and contended that the agreement as to the pit and mine conveyed merely one of those uncertain interests in land which have been held to require a written contract under stat. 29 Car. II. c. 3, s. 4. A rule nisi was granted. In last Easter vacation (2),

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### Whateley and Greares showed cause:

This case is distinguishable from Doe d. Hanley v. Wood (1), where nothing was granted but a permission to enter upon land and take minerals there found; here it may \*be collected from the evidence that the plaintiff was to have the soil itself; the house, the marl pit and the brick mine were all taken together, as the subject of one contract. Words "whether they run in the form of a licence, covenant, or agreement," are sufficient to constitute a lease, if they show "the intent of the parties, that the one shall devest himself of the possession, and the other come into it for such a determinate time: "4 Bac. Abr. 816 (7th ed.) Leases &c. (K). And the plaintiff here has adopted the agreement as a demise by paying rent. The terms of the holding are indeed so far uncertain that the rent cannot be ascertained without a measurement: but a periodical measurement to ascertain the rent is common in the mining districts; and certum est quod certum reddi potest. The stipulations here are like the ordinary one, that if a tenant converts pasture land into arable he shall pay rent at such a rate.

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(LORD DENMAN, Ch. J.: There the lease generally gives an express power to distrain.)

That is only for greater caution. The agreement in this case is good as a lease from year to year within stat. 29 Car. II. c. 3, s. 1: no question arises on sect. 4, because this is a cognizance for rent, not an "action" brought "to charge any person" "upon any contract or sale of lands," "nor any interest in or concerning them." "The statute," Lord Ellenborough says in Crosby v. Wadsworth (3), "does not expressly and immediately vacate such contracts," (under sect. 4) "if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party or his representatives, on the ground of such contract, and of some supposed breach thereof:" \*and the contract, in that case, was held not binding only on the ground of its having been discharged

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<sup>(1) 21</sup> R. R. 469 (2 B. & Ald. 724).

<sup>(2)</sup> May 10th. Before Lord Denman, Ch. J., Patteson, Williams and

Wightman, JJ.

<sup>(3) 8</sup> R. R. 566 (6 East, 602, 611).

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[ \*151 ]

while it was executory. Here it is executed; and the defendant relies on sect. 1. Bayley, B. says, in *Edge* v. *Stafford* (1): "The effect then of the Statute of Frauds, as far as it applies to parol leases not exceeding three years from the making, is this, that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession."

E. Yardley, contrà:

No demise was proved.

(Patteson, J.: As to the point on the Statute of Frauds, I see nothing in it. Why was this not a tenancy from year to year?)

The evidence showed no tenancy, but a licence merely. The house is distinct from the other subject-matters of the cognizances. It

appears that after the house was taken something was said about the pit and brick mine, and it was agreed that the plaintiff should take the marl and clay on certain terms, but not as a tenant, subjecting himself to a distress. The price was recoverable, but not as rent. The decisions on sect. 4 of the Statute of Frauds do not apply directly to this case; but they point out the distinction between demises and the less certain interests in lands which, for the purposes of that clause, require a written agreement. In the cases, which have been referred to, of farming leases, and in mining leases, it is usual to give the power to distrain by express provision. The objection of uncertainty has not been answered. The rule certum est &c. applies where, to ascertain the amount, \*nothing beyond a mere computation is necessary; but not where a measurement must first be made of something which is to be taken. It does not appear when the supposed tenancy was to commence, or how long to last. If there was any, it was only a tenancy at will, and no distress could be taken: Hegan v. Johnson (2), Dunk v. Hunter (3), Regnart v. Porter (4), Riseley v. Ryle (5).

(Patteson, J.: If a party says to another, "you shall have such a field, paying so much quarterly," and he enters, is not a tenancy created at that rent?)

<sup>(1) 35</sup> R. R. 746 (1 Cr. & J. 391,

<sup>397;</sup> S. C. 1 Tyr. 295, 301).

<sup>(2) 2</sup> Taunt. 148,

<sup>(3) 24</sup> R. R. 390 (5 B. & Ald. 322).

<sup>(4) 33</sup> R. R. 537 (7 Bing. 451).

<sup>(5) 11</sup> M, & W. 16,

When the rent, as such, has been paid; not before. As to the certainty of leases in respect of their continuance, it is said in 4 Bac. Abr. 835, Leases &c. (L) 3, that "this ought to be ascertained either by the express limitation of the parties at the time of the lease made, or by a reference to some collateral act, which may with equal certainty measure the continuance thereof."

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Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT.

After stating the material part of the pleadings, his Lordship proceeded as follows:

It was in proof that the plaintiff and the agent of the said Creswell agreed that the plaintiff should take a certain marl and slack pit, and pay yearly 8d. per yard for all the marl and slack got, at the four usual quarterly days. It was also at the same time agreed that the plaintiff should work a brick mine, and pay 1s. 8d. per thousand for all bricks made, quarterly at the usual days.

It appeared that these pits or mines, near to a house of Creswell occupied by the plaintiff (for the rent of which a distress was put in, but about which there was no question), were in work before they were taken by the plaintiff. And the question is, whether in this case rent is reserved for which a distress lies. That land was the subject of demise was, we believe, hardly questioned in the argument. Indeed, from the nature of the thing, the work in the mines or pits could not be prosecuted by the plaintiff at all without taking land in proportion to the extent of the operation.

Now, upon the principal question, we find in Co. Litt. 96 a the following passage. "It is a maxim in law, that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty; for, id certum est, quod certum reddi potest;" "and upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the manor which is certain, the lord may distrain for this uncertainty. Et sic de similibus." And again at page 142 a, Lord Coke, in commenting upon the expression "certain rent" in the text of Littleton, observes, "the rent must be certain, or which may be

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In the present instance, however, the rent is reserved in money; and the amount is, according to the criterion of Lord Coke, capable of being ascertained, "certum reddi potest," by the number of cubic yards of marl and slack got in the one case, and of bricks made in the other. And no point was made that the goods &c. were not taken upon the demised premises.

We are of opinion, therefore, that the verdict found for the defendant upon the issues joined upon the pleas to the above cognizances must stand.

Rule discharged.

1844.

June 5.

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#### REG. v. ROSE.

(6 Q. B. 153-158; S. C. 13 L. J. M. C. 155; 1 D. & M. 300; 8 Jur. 777.)

In the Highway Act, 5 & 6 Will. IV. c. 50, s. 27, which directs the surveyor to rate all property then liable to be rated to the poor, provided that the same rate shall also extend to such woods, mines, &c., as have heretofore been usually rated to the highways, the words "usually rated" refer, not to legal rateability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the country generally.

On appeal against a surveyor's rate on timber woods, the Sessions found for the appellant, subject to a case, which stated that the woods were not liable to poor rate: that, from 1809 down to the passing of stat. 5 & 6 Will. IV. c. 50, they had not been rated to the highways: and that timber woods of a like description had always been rated to the highways in the majority of parishes in the country and neighbourhood, but in some they had not been so rated since 1809.

Held, that the appellant's woods were not shown to be chargeable under sect. 27.

On appeal by Henry Philip Powys, Esq. against a rate made by Thomas Rose, the surveyor of the parish of Whitchurch in the counties of Oxfordshire and Berkshire, under stat. 5 & 6 Will. IV. c. 50, being the highway rate, at 6d. in the pound, for the year 1843, and which was allowed by two justices &c., the Sessions amended the rate by striking out the name of the appellant, and the word and sum "Woodland, 48l.," at which he was, in and by the said rate, among other properties, assessed; and by altering the aggregate amount of the annual value of the several properties in respect of which \*he was therein rated from 407l. 1s. to 359l. 1s.; and they confirmed the rate in all other respects, subject to the opinion of this Court upon the following case.

[ \*154 ]

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The appellant, from the year 1838 up to and at the time of the making of the rate appealed against, was the occupier of certain timber woods within the said parish of Whitchurch, the same not being saleable underwood within the intent and meaning of the Act of 43 Elizabeth (1), but being property which, at the time of the passing of the Act 5 & 6 Will. IV. c. 50, and also at the time of the making of the said rate, was not liable to be rated and assessed to the relief of the poor. From the year 1809 down to and including the year in which stat. 5 & 6 Will. IV. c. 50, was passed, the said timber woods had not been rated to the highways of the said parish. Since the passing of that statute, the appellant, as surveyor of the highways, under the last mentioned statute, for the year 1840, rated himself in respect of the said timber woods, and paid Timber woods of a similar description to those occupied by the appellant have always been rated to the repairs of the highways in the majority of the parishes in the country and neighbourhood; but in some they have not been so rated since the year 1809. It was admitted that, if the appellant was rateable in respect of the woods in question, the amount of the rate was fair: and the only question between the appellant and respondent was, whether the appellant was rateable in respect of such timber woods. If the Court should be opinion that the appellant was so rateable, the order of Sessions was to be quashed; if of the contrary opinion, to be confirmed.

Walesby in support of the order of Sessions:

The point arises on stat. 5 & 6 Will. IV. c. 50, s. 27, which, "in order to raise money for carrying the several purposes of this Act into execution," enacts, "That a rate shall be made, assessed, and levied by the surveyor upon all property now liable to be rated and assessed to the relief of the poor; provided that the same rate shall also extend to such woods, mines, and quarries of stone, or other hereditaments, as have heretofore been usually rated to the highways;" and the question is, whether the hereditaments spoken of in the proviso are such as have been usually rated throughout the whole kingdom or only in the parish for which the rate is made. (The Court here said that it would be most convenient to hear the other side first.)

Keating and Phinn for the respondents:

The proviso relates to hereditaments which, before the statute,

(1) Stat. 43 Eliz. c. 2, s. 1 [Extd. and rep. as to saleable underwood, 37 & 38 Vict. c. 54.]

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have been legally rated throughout the kingdom; and all woods were rateable for the highways (as appears by stat. 18 Geo. III. c. 78, s. 34, stat. 34 Geo. III. c. 74, s. 4, and other enactments as to statute duty), though all were not rateable to the poor. Legislature cannot have meant the liability to depend on the practice in a particular parish. Sect. 33 of stat. 5 & 6 Will. IV. c. 50, does give a specific exemption, in the case where "property, or the owner or occupier in respect thereof, has, previous to the passing of this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate:" but under that clause, if it were alleged that property had not been usually rated in the particular parish, the Court could not enter into such a question. It may be \*argued that the surveyor of a parish could not ascertain what had been usually rated in other parts of the kingdom; but the Court must look to the words of the statute, not to a suggested inconvenience.

(PATTESON, J.: The clause seems to imply that some of the hereditaments were not usually rated.)

All woods were legally rateable; the expression "usually" may refer to an exception in cases where there have been compositions. The construction argued for on the other side would release parties who have hitherto contributed by statute labour. The appellant is seeking a special exemption; he ought to point out words which expressly give it.

(COLERIDGE, J.: If all wood was in point of law rateable to the highways before the statute, the words "heretofore" "usually rated" can refer only to the question of fact, what has been rated or omitted in the rates.)

Still the question of fact relates to the general usage throughout the country.

(LORD DENMAN, Ch. J.: The case says that woods like the appellant's have been rated "in the majority of the parishes in the country and neighbourhood." I do not know what is meant by the "country" or "neighbourhood.")

Walesby, contrà:

What has been "usually rated," is a question of usage and fact to be determined by the surveyor. The respondent's construction

makes "rated" synonymous with "rateable." (He was then stopped by the Court.)

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#### LORD DENMAN, Ch. J.:

It is impossible to put a satisfactory construction on this clause. The expression "such woods" "as have heretofore been usually rated" implies that particular woods have not heretofore been \*so. But it seems that all were by law rateable; therefore, I do not see how we can find any other meaning for the exception than "woods heretofore actually rated in the parish for which the rate is made." The case states that these woods were not rated from the year 1809, till the passing of the statute; and, if so, they are exempt under sect. 27. I do not feel perfectly satisfied with this construction; but the words may fairly bear it.

# PATTESON, J.:

The words "have heretofore been usually rated" must be confined to the particular parish, or I do not know what length the enquiry may go to: but whether the particular woods are meant, or only the kind of wood, I do not say. It is sufficient here that the woods in question were not rated, nor do any such woods appear to have been rated in the parish, from 1809 till the passing of stat. 5 & 6 Will. IV. c. 50.

# WILLIAMS, J.:

We cannot adopt Mr. Keating's argument without holding that "rated" means "rateable." The twenty-seventh section must contemplate that which is the usual mode of rating in the particular parish. Then the finding of the Sessions decides the case for the appellant.

# COLERIDGE, J.:

In a modern Act, and one so full of words as this, the literal construction is the safe one, unless another be clearly shown which we ought to adopt. Under this clause, it would not be difficult for the surveyor to find what had been the usage in the parish; but he would have great difficulty in ascertaining the usage of a "neighbourhood," and deciding upon \*the majority or minority of instances in so wide a district. And the comparative difficulty would be the same on the trial of an appeal.

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Order of Sessions confirmed,

1844.

June 5.

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REG. v. THE INHABITANTS OF STOKE BLISS.

(6 Q. B. 158-163; 13 L. J. M. C. 151; D. & M. 135; 8 Jur. 536.)

Parish officers, having given notice of appeal against an order of removal, served a countermand, stating that they did so on account of the absence of a witness, but should give fresh notice of appeal. The countermand was too late for the Sessions. At the Sessions, the respondents entered the appeal and moved for costs. The Sessions made an order, whereby, after reciting that service of notice of appeal on the respondents had been proved, and that no one appeared for the appellants to prosecute such appeal, they adjudged that the order of removal should be confirmed, and that the appellants should forthwith pay the respondents 15l. for their costs and charges which they had incurred and been put to in attending the Sessions that day to support the order.

Held, on motion to quash, that the order of confirmation was bad for want of jurisdiction, and that the order for costs could not be separated from it: and therefore that the whole must be quashed.

Semble, per PATTESON, WILLIAMS and COLERIDGE, JJ., that an order for costs of the day only would have been good, under stat. 8 & 9 Will. III. c. 30, s. 3.

Two justices made an order for the removal of Ann Wall and her child from the parish of Kingswinford, Staffordshire, to the parish of Stoke Bliss, in Herefordshire. The order, examinations and notice of chargeability were duly transmitted to Stoke Bliss, and the churchwardens and overseers of that parish gave notice of appeal at the next Staffordshire Quarter Sessions, with the grounds of such appeal, one of which was a settlement of the paupers in a third parish. The Sessions began on Tuesday, January 2nd, 1844. On January 1st, the attorney for the appellants wrote a letter to the overseers of Kingswinford, stating that the notice of appeal was countermanded by reason of the absence of a material witness, and that the appellants were prepared to receive the paupers, but should give fresh notice of appeal, and were ready to furnish the respondents with any information which might prevent their removing \*the paupers and incurring further expense. The letter was received on January 2nd, and notice of countermand received on the same day. By the practice of the Staffordshire Sessions, a party giving notice of countermand later than the Monday before the Sessions, is liable to costs. The appellants did not enter their appeal or attend the Sessions. The respondents attended and moved for costs, calling a witness who proved service of the notice and grounds of appeal, and the countermand. The Sessions made the following order.

"Stoke Bliss Upon the motion of Mr. Whitmore, of counsel for Kingswinford. the churchwardens and overseers of the poor of the parish of Kingswinford in the county of Stafford, and upon proof

[ \*159 ]

of notice of appeal, with a statement in writing of the grounds of such appeal, signed by the churchwardens and overseers of the THE INHABI. poor of the parish of Stoke Bliss, in the county of Hereford, having TANTS OF STOKE BLISS. been given to the said churchwardens," &c. "of Kingswinford fourteen days previous to the Sessions now holden, against a certain order under the hands" &c., "for the removal of Ann Wall" &c.; "and no one appearing on behalf of the appellants to prosecute their appeal: It is ordered, that the said order so made" &c. "be, and the same is hereby, confirmed: And it is further ordered that the said churchwardens" &c. "of Stoke Bliss do and shall forthwith pay to the said churchwardens" &c. "of Kingswinford the sum of 15l. 10s. for the costs and charges which they have incurred and been put unto in attending the Court this day to support the said order. By the Court "&c.

The order was removed into this Court by certiorari: and, on a former day in this Term, W. H. Cooke moved \*that the order might be quashed, on affidavits setting forth the material facts, and stating (on information and belief) that the appeal was entered, and the fees of entry paid, by the respondents.

[ \*160 ]

#### Whitmore now showed cause:

Entering the appeal was a mistake; and the Sessions had no power to confirm the order of removal: but stat. 8 & 9 Will. III. c. 30, s. 3, empowers the justices in Sessions to give costs "upon any appeal before them there to be had," "or upon any proof before them there to be made, of notice of any such appeal to have been given by the proper officer to the churchwardens" &c. "of any parish or place (though they did not afterwards prosecute such appeal)." This case is within the latter alternative; the Sessions had jurisdiction to grant costs; and their order is divisible. It is, in fact, two orders on a single paper.

# W. H. Cooke, contrà :

The Sessions were misled into giving judgment on the order of removal; and the costs were ancillary to that judgment. The Justices of the West Riding (Sheffield v. Crich) (1) shows that the respondents had no right to proceed upon the appeal itself. A notice of appeal, not followed up, does not preclude the appellants from giving a fresh notice when the pauper is actually removed: "and as the eighty-fourth section of 4 & 5 Will. IV. c. 76, gives

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[ \*162 ]

the expenses of maintenance to the respondent parish, if successful, from the time of their giving notice of the chargeability, no material injury arises to them from the delay: "Reg. v. The Justices of Middlesex (1).

[\*161] (Patteson, J.: \*It is not said there that costs are not to be recovered in the meantime.)

Costs incurred in the meantime will be costs in the cause when the final decision takes place. When the appeal is heard, it may turn out that the proceedings on the part of the respondents were vexatious.

(PATTESON, J.: Suppose the appellants do not choose to go on.)

When the time for appeal is wholly gone by, the respondents may apply for costs under stat. 8 & 9 Will. III. c. 30, s. 3.

(Patteson, J.: If no appeal is prosecuted, can they go to a different Session from that which was named in the notice of appeal?)

The effect of stat. 8 & 9 Will. III. c. 30, s. 3, is that the justices may award costs "at the same Quarter Sessions" at which the application is made. But, under stat. 4 & 5 Will. IV. c. 76, the costs could not be applied for till the appeal is either decided or finally abandoned. The order here is so worded as to include the general costs of the appeal, not merely the costs occasioned by a notice countermanded too late.

# LORD DENMAN, Ch. J.:

The appellants in this case gave a notice of countermand, stating as their reason the want of a material witness, but intimating to the respondents that they still thought they had ground for resisting the order of removal. The respondents attended the Sessions, and obtained an order, confirming the order of removal with costs. It is said that the order of Sessions, though not otherwise maintainable, is good to the extent of the judgment for costs; and that the order is divisible. But I think that it is not so. Looking at the document, we must see that the Sessions have assumed to confirm the order of removal, and to award costs as ancillary to the judgment of confirmation, \*which judgment they had no right to give. The order must therefore be quashed.

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### PATTESON, J.:

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It is unfortunate that the Sessions have proceeded in this manner. The Inhabi-Their order states that, no one appearing to prosecute the appeal, STOKE BLISS. they confirm the order of removal. That they had no jurisdiction to do; and we cannot separate the order for costs from the order of confirmation. Whose the fault was, is not matter for our enquiry. I am far from saying, as at present advised, that, if the order of Sessions had been merely for costs of the day, it would not have been good. I do not hold that the new Act has, as Mr. Cooke suggests, done away with the provisions of stat. 8 & 9 Will. III. c. 30, s. 3.

#### WILLIAMS, J.:

On the last point I agree with my brother Patteson. If it were not as he states, a party receiving notice of countermand would be remediless in a case like this. But, looking at the document itself (and it is best to look at documents, and as little as possible at affidavits), we find that the order of Sessions, instead of being made merely to give compensation for the costs between notice of appeal and countermand, is an order expressly confirming the order of removal, with an award of costs.

#### COLERIDGE, J.:

The January Quarter Sessions were the time at which a proper application might have been made; and I do not say that the order of Sessions might not have been separable, if the latter part could have stood alone. This is a question of construction; and it is best not to look at the affidavits. Taking the \*intention from the document itself. I think the Sessions have assumed, in the first part of it, that they had power to confirm the order of removal; and the latter part is merely ancillary: therefore the whole order must fail.

Rule absolute.

f \*163 ]

1844. [ 166 ]

[ \*167 ]

### BESSEY AND COSTERTON v. WINDHAM.

(6 Q. B. 166-174; S. C. 14 L. J. Q. B. 7; 8 Jur. 824.)

An assignment of goods in fraud of creditors is valid as between parties to the deed, and as between either party and a stranger.

A sheriff claiming to seize the goods on behalf of a judgment creditor is a stranger within this rule, if he does not prove the legal authority under which he seized on behalf of such creditor.

For this purpose it is sufficient, in trespass for the seizure, if he prove the writ.

And there is some evidence of the writ, if the plaintiff puts in the sheriff's warrant to his officer, and that recites a writ at the suit of the judgment creditor (1).

The Judge, in an action brought against the sheriff as above, left it to the jury to say whether or not the parties to the alleged fraudulent conveyance meant any thing to pass by it; the jury found in the negative; and a verdict was taken for the defendant. The case went to the jury without notice of any proof that the sheriff acted under a writ sued out by the judgment creditor, the effect of the recital in the warrant being overlooked by all parties. A new trial was moved for on the ground that the sheriff, if standing in the situation of a stranger, could not impeach the deed; and the Court was of this opinion; but, on showing cause, the effect of the recital in the warrant was pointed out, and admitted by the Court.

Held, that a new trial ought not to be granted on the ground merely that the cause had been tried on an assumption that the alleged fraud would be a defence to the sheriff, without taking the jury's opinion on the effect of the recital as showing his right to make such defence.

TRESPASS for taking and converting plaintiffs' wherry, masts, &c. Pleas 1. Not guilty. 2. That the wherry, &c. were not the goods and chattels of plaintiffs, in manner and form &c. Issues thereon.

On the trial, before Lord Denman, Ch. J., at the Norwich Summer

Assizes, 1843, the facts appeared to be as follows. On January 2nd, 1848, Brinded, a coal-merchant, being indebted to the plaintiffs, executed a deed of assignment by way of security (2), to which Brinded was party of the first part and plaintiffs of the other part, and by which he bargained, sold and assigned the wherry &c. to plaintiffs, in trust to sell when they \*should think proper, and out of the proceeds to pay themselves 50l., part of their debt, and to pay Brinded the surplus (3). On January 10th Costerton went to the staith, near Brinded's house, where the wherry was lying in charge of a man employed by Brinded, and took possession. He ordered Brinded's man to load her with flints to go on a voyage for the plaintiffs: but, in consequence of the boat's rudder being

<sup>(1)</sup> See, however, White v. Morris (1852) 11 C. B. 1015, 21 L. J. C. P. 185.—A. C.

<sup>(2)</sup> See now Bills of Sales Act (1878) Amendment Act, 1882 (45 & 46 Vict.

c. 43).—A. C.

<sup>(3)</sup> There was a clause authorising Brinded to retain the wherry, &c. till plaintiffs should think fit to take possession.

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broken, the voyage was not made. Before giving the order, Costerton had said to Brinded: "If I take the wherry under my care, you shall go master of her." The boat remained in the same place (not being again used by Brinded) till January 16th, when the defendant, the sheriff of the county, seized her under a fi. fa. at the suit of Palmer, a judgment creditor of Brinded. The plaintiffs, to connect the defendant with the act of trespass, put in his warrant under which the seizure was made, and which recited the writ of fi. fa. The defence was that the assignment was colourable only, and void as against creditors; and it was urged, as a proof of fraud, that no real change of possession had taken place. Lord DENMAN, Ch. J. left to the jury, as the material question, whether, when Brinded made over the vessel, it was intended by the parties that the property should pass, or that Brinded should continue the owner. The jury were of opinion that nothing was really intended to pass: and they found a verdict for the defendant.

[ \*168 ]

B. Andrews, in the ensuing Term, moved for a new trial on the ground of misdirection, contending that no fraud appeared, and that, even if it did, the deed was valid as against the assignor himself and strangers; and \*that the defendant stood in the situation of a stranger, there being no sufficient proof of a fi. fu. He cited Doe d. Roberts v. Roberts (1), and Lake v. Billers (2), Ackworth v. Kempe (3), and 1 Stark. Ev. 329, 3rd ed. A rule nisi was granted. In last Easter vacation (May 9th) (4),

#### Palmer and J. Wells showed cause:

It must be assumed, here, that no actual change of possession took place. That fact does not necessarily show fraud: Martindale v. Booth (5): but it may be a proof of fraud; and here fraud is, in effect, found by the jury. Doe d. Roberts v. Roberts (1) was the case of a defendant attempting to defeat the action by setting up his own fraud; and the guilt of both parties was expressly relied upon in the judgments of the Court: here the action is between one party to the fraud and the sheriff, who may justly urge it as an objection. Lake v. Billers (2) was cited in Martyn v. Podger (6), as showing that, in trespass against the sheriff for seizing goods, "the defendant, though sheriff, ought to give in evidence a copy of the

<sup>(1) 20</sup> R. R. 477 (2 B. & Ald. 367).

<sup>(2) 1</sup> Ld. Ray. 733.

<sup>(3) 1</sup> Doug. 40.

<sup>(4)</sup> May 9th, 1844. Before Lord

Denman, Ch. J., Patteson and Williams, JJ.

<sup>(5) 37</sup> R. R. 485 (3 B. & Ad. 498).

<sup>(6 5</sup> Burr. 2631.

BESSEY v. Windham. judgment:" but the Court said, nevertheless, that, in the case before them, where the plaintiff was claiming under a fraudulent bill of sale, "it might have been left to the jury, whether the plaintiff was in possession of the goods, or not." \* \*

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But, further, if the sheriff is required in this case to show his authority, there was some evidence of it; for the warrant put in by the plaintiffs recited the writ. [They cited Haynes v. Hayton (1), and Goss v. Quinton (2).]

[ 171 ] Gunning, contrà:

If Goss v. Quinton (2) shows that the recital in the warrant was some evidence of the writ, that case is not available here, because it was not left to the jury to say, upon such evidence, whether there had been a writ or not. In Haynes v. Hayton (3) the proof was much more complete than in the present case: a receipt by the sheriff's officer was first put in, stating that the money, "being five several forfeitures" &c., had been "levied for the sheriff of the county of Hereford;" and then the letter of the undersheriff, again referring explicitly to the proceedings on the part of the sheriff. The sheriff here is without defence on either of the issues. That on Not guilty was proved against him by the production of the warrant. On Not possessed, the sheriff cannot in this cause allege that the conveyance from Brinded to the plaintiffs was void and the chattel vested in a party from whom the sheriff does not deduce any title. \* \*

[ 172 ] LORD DENMAN, Ch. J., in this Term (June 10th), delivered the judgment of the Court:

The sole question turned on the effect of a deed conveying a debtor's property to the plaintiffs. The jury found it fraudulent; but the defendant's learned counsel submitted that, though this might be so against creditors, it operated to pass the goods as against the party himself and strangers, according to *Doe* d. *Roberts* v. *Roberts* (4) and other cases; and that the sheriff (defendant) ought to have proved the writ under which he directed his officer to act.

We agree in this doctrine: but, cause being shown against this rule, it appeared from my notes of the evidence that the only mode

<sup>(1) 6</sup> L. J. K. B. 231. Easter T.

<sup>(3) 6</sup> L. J. K. B. 231.

<sup>1828.</sup> (2) 60 R. R. 616 (3 Man. & G. 825).

<sup>(4) 20</sup> R. R. 477 (2 B. & Ald. 367).

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of fixing the sheriff was the production of his warrant, which recited a writ. A case of Haynes v. Hayton (1) was cited from the Law Journal: there the Court upheld a ruling at Nisi Prius that an undersheriff's letter, produced by the plaintiff to affect the sheriff, was evidence of the facts therein stated, which tended to excuse The matter was fully debated in Goss v. Quinton (2), where the Court of Common Pleas held that the plaintiffs, assignees of a bankrupt, by putting the defendant's examination in evidence as proof that he took certain property, made his cross examination also evidence in the cause, wherein he stated, in answer to a question from his own attorney, that he had purchased it under a written agreement, without producing or accounting for such agreement, and without notice to produce it. Here, therefore, the proof of seizure involved some evidence of its having been made by the authority of the law, and such evidence as leaves no possibility of doubt as to its truth.

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The validity of the deed as to its merits has been tried in a state of things more favourable to the plaintiff than if the judgment had been proved on the trial. It was urged that this evidence ought to have been submitted to the jury, who ought to have exercised their judgment on its sufficiency; according to the well established principle that, if their verdict has been or could have been influenced by any evidence improperly received, the losing party has a right to a new trial (3). But we do not think that principle applicable here, where the specific evidence was neither objected to nor open to any objection, but overlooked by both parties, and, when observed, is, in truth, conclusive on the point. The mistaken view taken by the Judge of the law in respect to the validity of the deed against all but creditors could have no effect on the proof of this part of the case, because the state of facts makes it immaterial.

Rule discharged (4).

execution at the suit of Gillett and Habershon. To fix the sheriff, the warrant, reciting the writ of fi. fa., was put in. The plaintiff claimed under an assignment to him from the debtor; the defence was that such assignment was fraudulent and void against creditors. At the close of the defendant's case, Wortley, for the plaintiff, objected that the writ should be put in, to show that the sheriff was

<sup>(1) 6</sup> L. J. K. B. 231.

<sup>(2) 60</sup> R. R. 616 (3 Man. & G. 825).

<sup>(3)</sup> See Wright v. Doe d. Tatham, 47 R. R. 137 (7 Ad. & El. 313); Crease v. Barrett, 40 R. R. 779 (1 Cr. M. & R. 919; S. C. 5 Tyr. 458); De Rutzen v. Farr, 4 Ad. & El. 53.

<sup>(4)</sup> Glave v. Wentworth, Esq., York Spring Assizes (March 7th), 1842, before Parke, B. Trover against the sheriff for seizing goods under an

1846. Jan. 22. 179

# REG. v. THE GREAT WESTERN RAILWAY COMPANY.

(6 Q. B. 179-208; S. C. 15 L. J. M. C. 80; 10 Jur. 134.)

The Great Western Railway Company were occupiers of a railway, their property, and constructed by them, and of branch railways which they rented: and they used the several lines as carriers for hire, working the whole as one concern. In the parish of T., through which the main line passed, they were rated for the railway as follows:

The gross receipts on the several railways were added together, and the total divided by the number of miles in all the railways. The expenses on all, allowable as deductions from poor rate, were added together and divided in the same manner. The expenses on the number of miles in T. the calculation for each single mile being as above, were then subtracted from the receipts thereon, and the assessment was made on the residue. with an allowance for interest on the plant or moveable stock, and for tenants' profits, including profits of trade.

On appeal against the rate, further deductions were claimed, as follows: and the Sessions stated a case for the opinion of this Court on the legality of them.

- 1. For stations and other buildings appurtenant to, and necessary for the profitable enjoyment of, the railway, but rated or rateable separately from it, and in other parishes than T. Held allowable.
- 2. Allowance having been made in the rate for "maintenance of way," a further deduction was claimed for depreciation and wear and tear of rails and sleepers, being the solid timber and iron work of the principal line. The renewal of these had been paid for out of the Company's capital, not their revenue. Held not allowable.
- 3. Interest upon outlay in forming the Company, obtaining their Act of incorporation (5 & 6 Will. IV. c. cvii.), raising the capital, and other original expenses. Held not allowable.
- 4. "Income tax paid by the Company in pursuance of stat. 5 & 6 Vict. c. 35, amounting in the whole to 10,000l." Held allowable so far as regards the tax imposed in respect of mere occupation (1).
- 5. "Additional parochial assessments, not actually paid, but which will be payable in consequence of the recent decisions of this Court on the rating of railways." Held not allowable.
- 6. The branch lines were worked at a loss, which the Company incurred solely on account of the increased traffic occasioned by those lines on the principal railway; and a deduction was claimed for this loss. Held not allowable.
- 7. In estimating the tenants' profits, a percentage was taken on the original value of the moveable stock, at such a rate as might reasonably

acting for a creditor. PARKE, B. held that, the assignment being good between the parties to it, and only void against creditors, the writ itself must be produced, otherwise the sheriff was a wrong-doer: and, as the writ could not be produced, he directed a verdict for the plaintiff.

Wortley and Pashley for the plaintiff, Baines and W. H. Watson for the defendant.

In the ensuing Term (April 20th. 1842), Baines, acquiescing in the decision, moved on affidavits of surprise that a new trial might be had on payment of costs; which rule the Court of Exchequer made absolute. See 1 Phill. Ev. 344 et seq., Parti. c. 7, s. 10, 9th ed.

(1) Cp. R. v. Sauthampton Dock Co. (1851) 14 Q. B. 587, 20 L. J. M. C. 155.

induce a lessee, obtaining that amount of profit, to pay the residue of profits as rent. The appellants contended that the percentage should have been taken on the gross receipts: Held, that this was a question for the Sessions, not for the Queen's Bench.

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9 (1). The following increase of assessment was claimed by the respondents. The moveable stock had, in making the rate, been estimated at its original value, which exceeded the actual value at the time of assessment. The respondents insisted that any calculation of the value for the purpose of reducing the rate, should be taken according to the latter state of the property: Held, that the estimate ought to be so taken.

[ \*180 ]

On appeal against two several rates, bearing date respectively 3rd November, 1842, and 16th February, 1843, in the former of which the Great Western Railway \*Company were rated, as occupiers of the Great Western Railway with the appurtenances, in respect of a portion of the said railway extending two miles and one sixteenth of a mile in length within the said parish, and containing thirty acres of land, at the sum of 2,475l., and in the latter in respect of the same property at the sum of 3,093l. 15s., the said two rates being respectively at the rate of 1,200l. and 1,500l. per mile, the Sessions (Berks, Easter, 1843) confirmed the rates, subject to the opinion of this Court on the following case.

The Great Western Railway Company are established by a certain Act passed &c. (5 & 6 Will. IV. c. cvii., local and personal, public, and three other Acts &c., 6 & 7 Will. IV. c. xxxviii., 7 Will. IV. & 1 Vict. c. xci., and 2 & 3 Vict. c. xxvii., local and personal, public). Copies of these Acts, and of the two half yearly reports made at two general meetings of the Company, held 18th August, 1842, and 10th February, 1843 (2), which accompanied the case and were admitted to be correct statements, were to be deemed part thereof &c.

Under the power contained in those Acts, or one of them, the Company have completed a line of railway from Paddington in the county of Middlesex to Bristol, being a length of 118 miles: and this railway, for two miles and one sixteenth of a mile thereof, passes through the parish of Tilehurst.

The Great Western Railway Company, in order to increase the traffic on their line, became, and were before and at the making of the rates, lessees of a branch line from Bristol to Taunton in the county of Somerset for a term of years, on the terms of paying to the proprietors thereof for the use of the whole of the said branch line, \*being a distance of forty-four miles, including the right to use the stations, and the right of taking all rates and tolls for the

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<sup>(1)</sup> An eighth question was raised, (2) See p. 347, post. which became immaterial.

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conveyance of passengers, cattle and goods, the sum of 50,000%. per annum.

In the like manner and for the same purpose the said Company became lessees of a branch line from Swindon to Circnester, being a distance of eighteen miles; and for the use of which, including all the rights and privileges above mentioned, the said Company, at the making of the rates, were liable to pay to the proprietors thereof a rent of 17,000l. per annum.

By reason of the incomplete state of the branch railways, the whole length of permanent way worked by the Great Western Railway Company, both as proprietors and as such lessees, amounted, during the current year of rating, to 175 miles only. The Company, as such lessees of the two last mentioned lines, were in fact, at the time of making the rates, incurring annually a loss of 10,500l., over and above the actual net receipts, in respect of those two branch lines, the rents exceeding by that sum the net profits earned on those lines: and this loss was incurred solely for the purpose of benefiting by the increased traffic occasioned by those lines on the Great Western Railway. The appellants do not themselves maintain or repair the above branch railways, or the buildings connected with them: but they pay rates in respect of them; and they carry on the business of carriers jointly on the whole of the united lines as one entire concern.

The said Company, since the passing of their Act and the completion of the railway, have not only taken certain tolls authorised by the said Act, but they have also provided the locomotive powers and carriages, and \*have themselves conveyed upon all the three railways passengers, cattle and goods for hire in addition to the said rates and tolls; and in point of fact the said Company, since the completion of the said railways, have been in exclusive occupation of the said railways as carriers, no other carriers having availed themselves of the privileges, conferred by the Act, of providing carriages or power independent of the Company.

There is no station or building in Tilehurst; nor is there any extraordinary profit or expense in the repair or maintenance of the way in that parish: but the expenses may, for the purpose of these rates, be fairly taken as proportionable to the length in the parish as compared with the whole length of the united lines. The different stations and buildings throughout the lines are to be considered as rated separately from the railway.

The following are the detailed particulars of the mode in which

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the rate allowed by the Court of Quarter Sessions was ascertained by the parish officers.

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The gross receipts of each mile in the parish of Tilehurst were ascertained to be 3,680l.

The expenses of the whole line of the three railways, during the period to which the rates apply, amounted to the sum of 257,205l. 14s. 11d. comprised under the following heads (1).

1. Maintenance of way	£49,643	6	5	
2. Locomotive account: viz., coal, coke, repairs,	,		-	
wages to drivers, firemen, &c., oil, tallow,				
and all other incidental expenses	74,725	9	0	
3. Carrying account: viz. wages to guards and				[ 183
conductors, police messengers and porters.				
Clothing, repairs of carriages, stores, &c	60,714	15	2	
4. General charges: viz., superintendents' and				
clerks' salaries, advertising, printing,				
stationery, and sundries, including travelling				
expenses	23,126	2	11	
5. Disbursements for repairs and alterations of				
stations and buildings connected with the				
railway	1,682	6	8	
6. Compensation for fire and other accidents,				
and other annual returns and allowances	4 200	4.0	_	
connected with the trade	1,586	10	0	
7. Government duty on gross receipts from	0 = 500		•	
passengers	25,783	4	6	
8. Rates and taxes of all kinds assessed on the				
Company in respect of the property, and	11 040	4.	•	
actually paid (other than the property tax)	11,840		_	
9. Direction and office expenses	8,643	5	7	
-				

Adding to this the annual depreciation of the plant or moveable stock necessary for working the whole line of railway together with the branches, which amounted to 20,000l. a year, the total expenses amounted to 277,205l. 14s. 11d.

of the original case as finally settled by consent of the parties.

Total £257,205 14 11

<sup>(1)</sup> The figures which follow are in some respect inaccurate, but have been compared, and agree, with those

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The proportionable expenses of one mile, being th of the whole The value of the whole plant or moveable stock at its first cost

was about 580,000l.

On this sum the respondents allowed 5l. per cent. as interest on that stock £29,000 10 per cent. as tenants' profits, including the profits of trade 58,000

£87,000 The portion of this in respect of one mile in Tilehurst parish (being 175th of the whole) 497

From the gross receipts for each mile in Tilehurst they then deducted the proportion of the above expenses chargeable on it, and the portion of the above percentages due in respect of it, thus-

> Gross receipts -£3,680 Expenses - £1.584 Interest and profits 497 2,081 £1,599

This balance of 1,599l. was taken by the respondents, and found by the Sessions, to represent the net rateable value of each mile of the railway in Tilehurst parish: and the Sessions find the above amounts and sums to be correct, but submit to the judgment of this Court the principle on which the calculation is founded, and the propriety and sufficiency of the deductions. They further state that the percentage mentioned above as tenants' profits is not to be taken as the actual profits of the Company from trade, the whole of their receipts and profits being in fact derived directly from their trade, but the Sessions find that percentage to include such a reasonable profit of trade as would induce a lessee who carried on the like business under the \*same circumstances to forego the rest and to pay it as rent.

[ \*185 ]

The appellants contended that, assuming the estimate of the respondents to be founded on just principles, the following additional deductions ought to be made.

1. The buildings, stations, shops, sheds and other erections appurtenant to the Great Western line alone, rated or rateable separately from the railway, and necessary for the profitable enjoyment of it, may be taken, for the purposes of these rates, as worth 35,000l. a year rateable value at the time of making the rates: and the appellants claim a portion of this sum to be deducted from the receipts in Tilehurst parish. This deduction,

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If to be taken as 118th of the whole, 296l. per mile.

If to be taken as 12sth of the whole, 2001, per mile.

In like manner, the annual value of the buildings, stations, &c., on the two branch railways above mentioned, may be taken at 10,000l. per annum; and, if the united value of these buildings in all the three railways is a proper deduction, then the deduction (being  $\frac{1}{15}$ th of the whole), 257l. per mile.

2. The appellants further claimed a deduction in respect of depreciation and wear and tear of rails and sleepers, being the solid timber and iron work of the Great Western Railway alone.

This expense is not included in the item of "maintenance of way" above mentioned; nor has it been found necessary as yet by the Company to appropriate any annual fund for this purpose, because this expense has hitherto been taken from the capital, and not deducted from the revenue. But such deduction, if proper, is to be taken at 20,000l. a year in respect of the whole of the Great Western Railway, exclusive of the branches.

If divided by 118, the amount per mile is 169l.

If divided by 175, the amount per mile is 114l.

3. The appellants further claim the following deductions. Five per cent. interest on 420,000l., being the outlay in forming the Great Western Railway Company, obtaining the Act of incorporation, raising the capital, and other original expenses; 21,000l. per annum.

- 4. Income tax paid by the Company in pursuance of stat. 5 & 6 Vict. c. 35, amounting in the whole to 10,000l.
- 5. Additional parochial assessments not actually paid, but which will be payable in consequence of the recent decisions of this Court on the rating of railways; 12,000l. at least. This last item includes the rates on all the three railways occupied by the Company. It has not yet been paid; nor can it be clearly ascertained until the deductions are settled in each rate.
- 6. The annual total loss on the two branch lines already referred to, 10,500l.

The appellants further contended that, instead of ascertaining the tenants' profits by a percentage on the original value of the plant or moveable stock, they will be more correctly represented by a percentage on the gross receipts, and that for that purpose 15 per cent. on 3,680l. should be deducted, viz. 552l.

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It was stated on the part of the respondents that the plant or moveable stock of the Company was, at the time of making the rate, depreciated in value: and the Sessions find that, in fact, it was so depreciated, and was then worth about 500,000l., and not the sum of 580,000l. as above stated: and, if any of the deductions demanded by the Company were allowed, then the respondents claimed to take such reduced value as the sum upon which interest and tenants' profits should be calculated, \*that is to say, 15 per cent. on this sum, 75,000l.; and the portion of this in respect of a mile in Tilehurst. 428l.

The Sessions find the several sums and particulars above mentioned correct in amount for the purposes of the present case: and they refer to this Court the propriety and principle of all or any of the above deductions.

The rates are to be confirmed, quashed or amended, or the appeal remitted for further inquiry, according to the opinion of this Court upon all or any of the above points.

The case was argued in Michaelmas Term, 1844 (1).

Whateley, Tyrwhitt, and Bros for the respondents:

The deductions must be regulated by the principle laid down in stat. 6 & 7 Will. IV. c. 96, s. 1.

1. The Company are not entitled to any deduction for stations or buildings not situate in Tilehurst, and which are rated in other parishes.

There is no doubt that the Company derive great profits from some of these buildings: but the profits so accruing in any particular parish are not brought into account for the purpose of increasing the rate; neither should the rates paid for all or any of them in other parishes diminish the rate in Tilehurst.

(WILLIAMS, J.: Is that so, if those premises are rated to their full value in the other parishes?)

Tilehurst does not impose such rate; nor ought it to affect the calculation of that value in which Tilehurst is interested. [They referred to Reg. v. The London and South Western Railway Company (2), Reg. v. The Grand Junction Railway Company (3),

<sup>(1)</sup> November 13th. Before Lord Denman, Ch. J., Williams, Coleridge and Wightman, JJ.

<sup>(2) 55</sup> R. R. 351 (1 Q. B. 558, 585).

<sup>(3) 62</sup> R. R. 275 (4 Q. B. 18, 41).

Rex v. The Trustees of the Duke of Bridgewater (1), Rex v. Palmer (2), Rex v. Kingswinford (3), Rex v. Lower Mitton (4), Rex v. Woking (5), Rex v. The London and South Western Railway Company (6), and Reg. v. Capel (7).]

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2. Neither is any deduction to be made for depreciation of the permanent rails and sleepers. This is in fact an outlay to replace capital, and has been so treated by the Company in their accounts rendered to their proprietors under stat. 5 & 6 Will. IV. c. cvii. s. 145, which requires them to make up accounts twice in every year "of the charges and expenses attending the making, maintaining, and carrying on the said undertaking, and of all other the receipts and expenditure of the said Company, up to those periods respectively." These are to be laid before the proprietors; and they appear on the August and February reports forming part of the present case. The 146th section provides, that "no dividends shall be made exceeding the net amount of clear profit at the time being in the hands of the said Company, nor whereby the capital of the said Company shall in any degree be reduced or impaired." their accounts with the proprietors, the Company have treated this item as an additional outlay of \*capital, and not as an annual charge upon their revenue: they have no right, therefore, to represent it as an annual charge to be deducted from their profits, for the purpose of reducing the amount of rateable value. depreciation of the plant may be deducted, and has been allowed for by the Sessions, because the Company lay aside a portion of the revenue to meet that expense; but the reproduction of the permanent rail hitherto defrayed wholly out of the Company's capital is so much added to their original outlay (8). [They referred to Reg. v. The Cambridge Gas Light Company (9), Rex. v. Lower Mitton (4), Reg. v. The Cambridge Gas Light Company (10), Reg. v. The Grand Junction Railway Company (11), Rex v. The Trustees of the Duke of Bridgewater (1), and Rex v. The Hull Dock Company (12).]

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3. The claim in respect of outlay in forming the Company,

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- (1) 32 R. R. 574 (9 B. & C. 68).
- (2) 25 R. R. 502 (1 B. & C. 546).
- (3) 31 R. R. 181 (7 B. & C. 236).
- (4) 33 R. R. 337 (9 B. & C. 810).
- (5) 43 R. R. 289 (4 Ad. & El. 40).
- (6) 55 R. R. 351 (1 Q. B. 558).
- (7) 54 R. R. 580 (12 Ad. & El.
- 382). (8) The half-yearly reports, men-
- tioned, p. 341, ante, were referred to

in confirmation of these statements; and Hill, for the appellants, admitted that 10,000%. half-yearly was allowed in the accounts for depreciation of the plant, not of the permanent railway.

- (9) 47 R. R. 490 (8 Ad. & El. 73).
- (10) 47 R. R. 490 (8 Ad. & El. 73, 77).
- (11) 62 R. R. 275 (4 Q. B. 18).
- (12) 5 M. & S. 394.

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- 4. The attempt to charge the parish with the income tax on the Company's property is equally unauthorized.
- 5. So also is the deduction claimed in respect of rates not yet charged. "The propriety of a poor rate can only be determined with reference to the facts found to be actually existing when it was made: " Reg. v. The Grand Junction Railway Company (1); judgment of the Court.
- 6. The losses on the branch lines cannot affect the rateable value The argument as to the stations of the Great Western Railway. not situated in Tilehurst applies in a great measure to this part of To take these losses into consideration would be substituting an average calculation for that which the present assessment proceeds upon. And, as to the branch lines, the question is, whether the Company has a beneficial occupation of them, not whether they have been a profitable or a losing bargain in any particular year: Rex v. Parrot (2), Reg. v. Vange (3), Rex v. Attwood (4), Rex v. Mirfield (5), Rex v. The Hull Dock Company (6), Rex v. Chaplin (7). If the owner of a pleasure garden, to which persons were admitted for money, kept a boat to bring persons across a river to the garden, could he claim a deduction from the rate upon his garden for the expenses of the boat?
- 7. On the question, whether the tenants' profits should be ascertained by a percentage on the original value of the plant or moveable stock, or by a percentage on the gross receipts, the Court declined to give \*any judgment. Reg. v. The Cambridge Gas Light [ \*195 ] Company (8) and Reg. v. The Grand Junction Railway Company (9) were cited for the respondents.
  - 8. The question, whether, under the heads of reduction first and secondly above stated, the division should be by 118 or 175, was rendered immaterial by the judgment of the Court.
  - 9. The respondents' counsel contended that any deductions to be estimated by the value of the Company's plant or moveable stock
    - (1) 62 R. R. at p. 287 (4 Q. B. 35).
    - (2) 2 R. R. 672 (5 T. R. 593).
    - (3) 61 R. R. 219 (3 Q. B. 242).
    - (4) 30 R. R. 322 (6 B. & C. 277).

    - (5) 25 R. R. 412 (10 East, 219).
    - (6) 5 M. & S. 394.

- (7) 1 B. & Ad. 926.
- (8) 47 R. R. 490 (8 Ad. & El. 73).
- (9) 4 Q. B. 18, 38. See the argu-
- ment in Reg. v. Capel, 54 R. R. 580 (12 Ad. & El. 385).

should be reckoned according to the deteriorated value, as suggested in the case.

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Hill and Carrington, contrà:

The receipts in this case are estimated on the principle which seems to have been recognised in Rex v. The Oxford Canal Company (1), and was adopted in Req. v. The Grand Junction Railway Company (2), where the Court said, in giving judgment: "We understand them" (the Company) "to admit the principle of considering the whole line as entire, and to arrive at the exact sum, at which they contend that the rate in the respondent parish should be fixed, by a mileage division of the whole length; a principle very convenient in itself, and rightly adopted by consent." It may be admitted, here, that that principle is correctly adopted. But it follows that an abatement of the rate in Tilehurst must be made, on account of the stations in other parishes. The earnings on the whole line are calculated indiscriminately, not distinguishing so much as taken for the use \*of the railway and so much in respect of the stations; and they are thrown into an entire sum. earnings of each parish being taken according to the apportionment on the mileage principle, and all added together, the sum set down for the receipts of the whole line (including the branches) exhausts all sources of profit. The stations and other buildings cannot be reckoned in this calculation as sources of profit, but are considered as burthensome appurtenances necessary for the enjoyment of the line, so that it may produce the profit apportioned as before stated. The expenses of these must therefore be considered as a charge to be allowed for in estimating the rateable profits.

2. As to the depreciation fund, it is scarcely disputed on the other side that, whenever works have been done to which a fund of that kind is applicable, allowance should be made for them in the estimate for that \*year. The argument, in substance, is only that no such fund has at present been set apart. But, even with respect to ordinary repairs, that is no answer. [They cited Rex v. The Hull Dock Company (3), Reg. v. The Cambridge Gas Light Company (4), Rex v. Lower Mitton (5), and Rex v. Tomlinson (6).] It is not denied by \*the respondents that an allowance ought to be made for maintaining the subject of occupation in a state to

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<sup>(1) 10</sup> B. & C. 163.

<sup>(2) 62</sup> R. R. 275 (4 Q. B. 18).

<sup>(3) 5</sup> M. & S. 394.

<sup>(4) 47</sup> R. R. 490 (8 Ad. & El. 73).

<sup>(5) 33</sup> R. R. 337 (9 B. & C. 810).

<sup>(6) 32</sup> R. R. 616 (9 B. & C. 163).

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command the supposed rent; and renewal of the solid and essential parts is only maintenance on a large scale. Repair in the ordinary sense does not meet all modes of deterioration. The appellants, therefore, are right in claiming an allowance for these costs of renewal on a distributive calculation, and not waiting to claim them till a great expense of renovation shall actually have been incurred in one year, when they might be told that the cost ought to have been reckoned communibus annis. If the Company have in their accounts treated this item as an outlay taken from capital, and not as a charge on revenue, that cannot make any difference to the parish.

- 3. The expenses of forming a Company, obtaining an Act of Parliament, &c., ought to be allowed. The costs of the plant are deducted, because without them the trade could not be carried on at all: on the same principle the expenses necessary to the first establishment of the undertaking should be allowed also.
- 4. The income tax is an outgoing, to be deducted, like the others, from the gross receipts, in order to arrive at that which fairly represents rateable profits: and this deduction is consistent with stat. 5 & 6 Vict. c. 35, s. 1, schedules (A.) and (B.), the latter of which charges the tenant of lands in respect of his occupation; and with sect. 1 of stat. 6 & 7 Will. IV. c. 96, directing that the assessment to the poor rate shall be "free of all usual tenant's rates and taxes."

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5. On the principle of estimating by the expenses communibus annis, poor rates not yet imposed may be \*taken into consideration: and, though the amount is uncertain, 12,000% is given as a minimum.

(Coleridge, J.: This item can be considered only in future rates.)

6. The loss on the branch railways is an expense incurred in bringing traffic to the main line. In the case put on the other side, of a person keeping a garden, the expense of the boat, if paid by the owner of the garden, ought to be deducted, supposing his rack rent to be ascertained on the principle applied to railways. It is an expense which must affect the rent. He would not give so much for a garden which could only be enjoyed at the cost of keeping and working a ferry boat as for a garden free from such a burden and yet equally profitable. \* \* \*

9 (1). The depreciation of the Company's stock ought not to be taken into account. The question here must be, not what is the present state of the capital, but what capital has been actually embarked.

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Cur. adv. rult.

LORD DENMAN, Ch. J., in Hilary Term (January 22), 1846, delivered the judgment of the Court:

This case has stood over for some time from the wish to afford it the fullest consideration: and, as our decision must be governed by the principles laid down in the two cases of *The South Western* (2) and *Grand Junction* (3) *Railways*, it may be convenient to recapitulate briefly what was in those cases decided: not that they introduced any new principle into the law of rating, but because the circumstances under which the established principle was applied were somewhat novel.

We there laid down that, although the profits of trade carried on by the occupier of the land upon it cannot be made directly the subject of the rate assessed in respect of such occupation, and the value of the occupation alone was the proper subject, yet in that value was to be included whatever at the time formed part of it, whether permanently or not, and from whatever source derived, and, therefore, of course, not less so although derived, in any proportion, from the fact of the trade being so carried on upon it. Further, that, although the sum to be sought was that which, after all due deductions made, a tenant might be found to give by way of rent from year to year in order to be placed as occupier in the same position as the party rated, yet this was to be sought, not by drily considering what rent would be given for so many miles of railway as happened to be in the rating parish, apart from all the actually coexisting circumstances; but by including in the consideration all such as would necessarily attend upon the occupation under the demise, and influence the tenant's mind as to the amount of rent which he would give.

In the application of these principles the practical difficulty for those who assess the rate in cases of such complication as railways often present will be to distinguish accurately between that which is properly referable to the trade alone, and that increase of value [ 201 ]

<sup>(1)</sup> As to the seventh and eighth heads, see p. 348, ante.

<sup>(2)</sup> Reg. v. The London and South Western Ruilway Company, 55 R. R.

<sup>351 (1</sup> Q. B. 558).

<sup>(3)</sup> Reg. v. The Grand Junction Railway Company, 62 R. R. 275 (4 Q. B. 18).

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which the carrying on of the trade upon the land gives to the occupation of it. The case of *The Grand Junction Railway* (1) presented many circumstances the same as exist in the case now before us; and we thought that \*the parish officers there had successfully met the difficulty. We are now to examine the rate stated in this case, only, however, as to its principles, and so much of its details as involve principle: beyond that, and especially as to the accuracy of calculations, the questions must be for the Sessions alone.

We have here a Company sole occupiers of a line of which they are owners. Of this the land in respect of which they are rated They are also sole occupiers, as lessees, of two branch forms a part. lines, both issuing out of the line first named. Upon all these lines they carry on exclusively a large trade as carriers, the net receipts of which from the branch lines alone, if set against their expenses and rent, would make the occupation of them in fact a losing concern; but this occupation increases the traffic upon the main line; and for the sake of this the Company are content to sustain that partial loss. In order to ascertain the rate, the course pursued has been to take the gross receipts per mile in the respondent parish; and this sum is not in dispute. The deductions to be made from this are calculated on a mileage proportion of all the expenses and outgoings, taking the whole three lines as one entire line in all particulars in which the appellants are at all chargeable; and we do not understand this mode to be objected to. Setting the proportion of these per mile against the gross receipts per mile, the residue has been taken as the rateable value per mile.

We are then to see whether these deductions include all such as ought to be made on an ordinary occupation exclusive of trade, and also all such matters as are distinctly referable to the trade only, and do not enhance the value of the occupation. If so, the principle of the \*rate is right: whether sufficient in amount under each head has been allowed, it is not for us to determine.

[ \*203 ]

Nine heads are first stated, which are intended to represent the annual expense of keeping in repair the way, stations and other buildings, the rates and taxes, other than the property tax, payable on them, the expenses of directing and carrying on the business, the Government duty on passengers, and some incidental charges connected with the trade. Thus far the outgoings allowed for ar annual.

The appellants here first object that, beside an allowance for the merely annual repairs, they are entitled to one in respect of the depreciation and wear and tear of the rails and sleepers, the solid timber and iron work of their own principal line; and this, although hitherto they have not charged such expense against their income, but defrayed it out of their capital. In the case of The Grand Junction Railway (1) such an allowance was conceded: it is now disputed: and the circumstances must therefore be examined. themselves, perhaps, repairs of the kind now under consideration are not to be distinguished in principle from what the case denominates maintenance of the way, and which the appellants include under their annual expenses; and, although not called for in any particular year, yet, if, in the certainty that the charge would, in a given time, accrue, a proportionate sum had been actually deducted from the annual revenue to meet it, we see no reason why an allowance should not be made for it as much as for annual repairs actually done in the course of the year. But, as, in the case of these last, the fact \*of repairs being needed would not entitle to a deduction unless they were done and the charge incurred, so, in the present case, as no deduction has been made from the revenue, it appears to us that no allowance can be made. For their own purposes, and, as suggested in the argument, in violation of their Act of Parliament, the Company have chosen to defray the amount, trifling probably at present, out of their capital, so that they have given that which they now seek to consider as tenants' repairs the character of landlord's improvements, the capital expended for which will swell the rateable value of land, but not be allowed in the rate.

The appellants next claimed to deduct the rateable value of the buildings appurtenant to their own line, and also to the branch lines respectively, and rated and rateable elsewhere than in the respondent parish, separately from the railway itself. This also is an allowance which was conceded in the case last referred to; for it would be hardly worth while to distinguish between those rated and rateable only; and we have no means of drawing the distinction in fact. It is to be remembered that the respondents properly treat the whole line, the whole profits, the whole outgoings, as entire; and then the question is whether there is any distinction between this and other outgoings necessary to the earning the profits by which the rateable value of the land in the respondent

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parish is enhanced. It seems to us there is none; and, if so, we agree with the learned counsel for the appellants that in principle it is indifferent whether the station be in the same parish or at a distance.

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The appellants claim, thirdly, an allowance for 21,000l. yearly interest on the sum expended in forming \*their Company, obtaining their Act of Parliament, raising their capital, and other original expenses. For this there is no foundation. These expenses have no connection with the rateable value of the railway. They might all have been incurred and no railway ever constructed. As well might the purchaser of an estate with borrowed money, and after an expensive litigation as to the title, claim to deduct his interest and expenses from the poor rate on the land when in his occupation. They neither add to the value of the occupation nor are any way necessary to the making it up.

The appellants then claim to be allowed in respect of 10,000%, paid by them as income tax under stat. 5 & 6 Vict. c. 35. This claim is very shortly and unsatisfactorily stated. In respect of what the payment has been made we are not informed on either side: the argument respecting it was short. The respondents treated the claim as made in respect of the charge on the property in land payable by the owner: the appellants claimed it in respect of the charge on the occupation payable by the tenant: and to this extent at least it does not strike us that there is any reasonable distinction between this and any other outgoing chargeable on the tenant, which would certainly affect the amount of the rent he would be willing to pay.

The fifth claim is to be allowed for such additional parochial assessments as may become payable, it is not said when or where, in consequence of the recent decisions of this Court; upon which we will only say that we think the Court would have been well justified in refusing to permit it to form part of the case.

[ \*206 ]

In the sixth place, the appellants claim to be allowed a deduction in respect of their loss on the two branch \*lines before referred to. We think this cannot be allowed. If the rate in question had been imposed on land forming any part of the branch lines themselves, it is clear that the circumstan of the receipts not equalling the rent,—in other words that the line was worked at a loss,—could not have affected the rate: the occupation would have still have been beneficial in the sense in which that word is used for the purpose of assessing the rate; and the rent which, from whatever

motive, the appellants found it worth their while to give would have regulated the amount. This is not that case in the way in which it is sought to make this expenditure bear upon the rates assessed on any part of the main line; it is more like money laid out in the way of improvement, for which no deduction should be made. If the lessee of a coal mine were to open roads through adjoining lands rented under a separate demise, in order to facilitate the access of customers to the mine and so increase its profits, the expense of such roads would certainly not be an outgoing to be allowed for by the overseers.

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Two more questions are stated; the first as to the mode of ascertaining the tenants' profits in order to their deduction from the rateable value. The respondents have taken the original value of the plant or moveable stock, and allowed ten per cent. upon it for these profits as well as the profits of trade. The appellants say that the more correct mode would be to ascertain them by a percentage on the gross receipts, and claim to have fifteen per cent. deducted from these on that account. We are very unwilling to withhold our aid in settling questions for the Sessions of such novelty and difficulty as the railway rating must often bring before "them; but we ought not to go beyond our province, and so perhaps mislead them. This question involves no principle of law; and we decline to answer it.

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The last is only raised by the respondents provisionally in case any of the deductions claimed by the Company should be allowed by us; but this has been done. In ascertaining the tenants' profits they have calculated the percentage on the original value of the moveable stock; but the Sessions have found that, at the time of the rate being made, the value had become less by 80,000l., and the respondents contend that the percentage should properly be made on the smaller sum. This seems to us correct: they are to make the rate from year to year, or for whatever shorter period, conformably to the facts as they exist at the time of making it. They may not know, nor have any means of knowing, what the value was originally or in any former year. If, at the end of five or ten years, they are to be driven back to the original value, they may be equally required to ascertain it after an interval of a century. No hardship is inflicted on the appellants by this; they may, and they ought, as prudent owners, to keep up the stock at its original value; and in this very case they have claimed a deduction for doing so. If that claim were properly made, the

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original and the present value would be the same. Although, however, we thus answer this question in favour of the respondents, they cannot avail themselves of the decision so as to increase their assessment beyond its present amount.

The consequence of the several decisions we have come to will be the amendment of the rate in one or \*two particulars: but, as the sums are ascertained by the Sessions, this may be done, we presume, by the counsel, without remitting the case again to the Sessions.

Rate to be amended.

1844. Jan. 23, 26. May 27.

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## DOE D. LORD EGREMONT v. STEPHENS.

(6 Q. B. 208-228; S. C. 13 L. J. Q. B. 350; 8 Jur. 951.)

Lands were devised for life, remainder over, with power to the tenant for life to lease, "in possession or reversion, for one life or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the said premises usually so leased;" "so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more; and so that, in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and reasonable covenants;" "and so as no clause or clauses be contained in any of the said leases giving power to any lessee to commit waste, or exempting him, her or them from punishment for committing the same."

1. Held, that a lease by the tenant for life comprehending, at a single rent, as well some of the lands devised, as others not devised and not previously let with those devised, was bad as to the lands devised, although the rent reserved, with the heriots, &c., was in proportion to the rents, &c., previously reserved on all respectively.

2. But that, against a party claiming as heir of the lessor, the lease was good as to the lands not devised.

3. That, if the lease had comprehended only lands devised, it would not have been avoided by proof that the lands included in the lease had never before been let by a single demise; it also appearing that the rents &c. reserved were in proportion to the rents &c., formerly reserved.

4. That the lease was not avoided by its containing a stipulation that the lessee should build a new dwelling-house, and might pull down an outhouse and use the materials for so building; no other facts being proved to show that this would amount to waste.

5. A., parcel of the lands devised, and leased by the tenant for life, had previously been demised by a lease containing a stipulation that the lesses should do suit by grinding at a certain mill; but a later lease of A., which was granted by the testator and running when the will was made, contained no such clause: Held, that a lease by the tenant for life was not bad for not containing such a clause.

6. C., also parcel of the lands devised, and leased by the tenant for life, had previously been leased by a deed which contained the same stipulation immediately after the *reddendum*. The lease following this, which was granted by the testator, and running at the time of making the will, was lost: Held (the Court having power to find facts on a special case stating

as above) that it was to be inferred that such a stipulation was a usual and reasonable covenant. And this, whether evidence (which was offered) were or were not admissible that the testator had frequently leased other parcels of the manor which included A. and C., omitting the stipulation in all such leases, though the previous leases of those other parcels contained it:

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7. Held, that a lease of C. by the tenant for life which did not contain the stipulation was therefore void.

EJECTMENT for messuages, tenements, gardens, lands and premises, situate in the parish of St. Decuman's in Somersetshire, being the premises expressed \*to be demised in the indenture of lease marked A., hereinafter mentioned, parts of four several tenements formerly known by the several names of Andrew's or Stanley's Tenement, Stone's Tenement, Crang's Tenement, and Grayborough, parcel of Wakefield's.

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The demise, from George Wyndham, Earl of Egremont, was dated 1st October, 1838.

On the trial, before Rolfe, B., at the Somersetshire Spring Assizes, 1840, a verdict was found for the plaintiff in respect of Stanley's Tenement and Crang's Tenement; and the defendant claimed to have the verdict entered for her as to the other two tenements, Stone's and Grayborough, parcel of Wakefield's; subject to the opinion of this Court on a case substantially as follows:

Charles, Earl of Egremont, before and at the date of his will, bearing date 31st July, 1761, and from thence to the time of his death, was seised in his demesne as of fee of the premises mentioned in the declaration: and, being so seised, by his will bearing date &c., devised all his manors, messuages, lands, advowsons, rents, and hereditaments, parts and shares of manors, messuages, &c. (including the manor of Williton Regis, hereinafter mentioned), in the several counties of Somerset, Dorset, and Cornwall, with their respective rights, members and appurtenances, part of the estate of his father Sir William Wyndham, Bart., deceased, unto his eldest son George, Lord Cockermouth, and his assigns, for life, without impeachment of waste; remainder over, which failed before the death of George, Lord Cockermouth; remainders to the fourth, fifth, and all and every other the son and sons of the said testator's body lawfully begotten &c., and to the respective heirs male of the \*body of such son and sons lawfully issuing. The will contained the following power.

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"And I do hereby further will and declare that it shall and may be lawful to and for the several and respective persons to whom any estate for life is hereinbefore devised, when and as they DOE d. LORD EGREMONT c. STEPHENS.

[ \*211 ]

respectively shall be in the actual possession of the said manors, messuages, lands, tenements and hereditaments, parts and shares of manors, messuages, lands, tenements, hereditaments and premises, · hereinbefore devised to them respectively, for their respective lives. as aforesaid, or any part thereof, by virtue of the limitations hereinbefore contained, by indenture or indentures under their espective hands and seals, to demise, lease, and grant all or any of the manors, messuages, lands, tenements and hereditaments. parts and shares," &c., "hereinbefore mentioned to be hereby devised or limited, to any person or persons for any term or number of years not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest, so as in every such lease or demise there be reserved to continue, payable half-yearly or oftener during the term thereby to be granted, and be incident and go along with the reversion or remainder of the same premises expectant thereon, the best and most improved yearly rent and rents that can, at the time of making such leases, reasonably be got for the same, without taking for the making of any such lease or leases any fine, premium or foregift; and also to demise, lease and grant, in possession or reversion, for one life or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the said premises usually so leased, so that all the leases to be made by virtue hereof, \*which shall be in force at the same time, shall be determinable on the dropping of one life, or the dropping of two or three lives at the most; and so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more; and so that, in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained: and so as no clause or clauses be contained in any of the said leases giving power to any lessee to commit waste, or exempting him, her or them from punishment for committing the same; and so as the respective lessees do execute counterparts of all such leases."

The said Charles, Earl of Egremont, died on the 21st August, 1768, without having revoked or altered his said will, leaving four

sons born in lawful wedlock; namely, George O'Brien, his eldest son, in the said will called George, Lord Cockermouth, who succeeded his father as Earl of Egremont; and two other sons, who died before George O'Brien without having had issue, as was more particularly stated in the case. William Frederick Wyndham, the fourth son, died on 18th February, 1828, leaving the lessor of the plaintiff, his eldest son and heir-at-law, him surviving. George O'Brien, Earl of Egremont, died on 11th November, 1837, without having ever had issue.

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On the death of the testator, the said George O'Brien, Earl of Egremont, entered into the possession and receipt \*of the rents of the said manors &c., so devised as aforesaid, as tenant for life under the will; and, being such tenant for life, executed an indenture of lease, bearing date 29th September, 1828, between the said George O'Brien, Earl of Egremont, of the one part, and Mary Stephens of the other part.

[ \*212 ]

A copy of this lease was annexed to the case, marked A. (1) lease was for ninety years, if three persons named, or either of them. should so long live. The material parts of the lease appear in the body of the case, except the following. By the statement of the consideration for making the lease, it appeared that the same was made in consideration of the surrender of a former lease, of certain money paid, "and also in consideration of the said lessee's undertaking forthwith effectually to repair the present dwelling-house, and to build another respectable dwelling-house on some convenient part of the premises hereinafter mentioned, called Crang's (and which the said lessee doth hereby covenant to do accordingly)." And afterwards, in the description of the parcels, were the words "And also all that other messuage or dwelling-house in Williton aforesaid, commonly called or known by the name of Crang's, with the outbuildings, barton and gardens thereto adjoining and. belonging, containing, by estimation, half an acre (part of which premises have for many years past been used as a tallow-chandler's shop; and which outbuildings the said lessee is at liberty to take down, or such part thereof as she may think proper, and the materials to be used in the house to be erected as aforesaid)." And, in a later part of the lease, was a covenant that the lessee, her executors, &c., \*" shall and will repair and keep in sufficient and proper repair, at all times, all and singular the premises hereby

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<sup>(1)</sup> The parts included between stated case, but have been abstracted brackets, in the text, were not in the from the leases annexed.

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demised, in every respect whatsoever, and so leave and surrender up the same at the end of the said term, and shall not do, permit or suffer to be done, any waste, dilapidation or damage on the said premises." This lease contained no clause as to grinding at Orchard Mills, after mentioned. A counterpart thereof was duly executed by the said Mary Stephens.

The following are the particulars of the objections to the above lease, delivered under a Judge's order.

- 1. That the terms and provisions of the power of leasing contained in the will of Charles, Earl of Egremont, were not pursued in making the said lease, and that the same was and is void against the remainder man.
- 2. That the premises therein comprised were not, before the creation of the said power, usually so leased; but that the same premises, or some parts thereof, were usually leased with certain other premises not comprised in the said indenture of lease, and were usually theretofore leased by separate and distinct leases.
- 3. That the ancient rents and heriots were not reserved in the said lease.
- 4. That the said lease gives liberty to the lessee to commit waste in and upon the said premises, and exempts her from punishment for committing the same.
- 5. That the said lease omits the following usual and reasonable covenant: "That the lessee shall do suit to the said mills, called Orchard Mills, by grinding at the said mills all such her and their corn, grain and malt as during the term shall be expended upon the premises, it being intended and meant that the miller there for the time being shall not take excessive toll."

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The premises comprised in the said lease consisted of parcels of the before mentioned four separate tenements, known and herein referred to by the following names, viz. Andrew's or Stanley's Tenement, Stone's Tenement, Crang's Tenement, and Grayborough, parcel of Wakefield's.

Andrew's or Stanley's Tenement and Crang's Tenement were established at the trial to have been part of the estate of Sir W. Wyndham, the deceased father of the testator, and to have passed by the above mentioned devise; but Stone's Tenement and Grayborough were not established to have been so, or to have so passed.

Before the said lease of the 29th September, 1828, the said four tenements had been usually let separately, and had never before been let together.

The lease of Andrew's or Stanley's Tenement, in existence at the time of making the will of Charles, Earl of Egremont, and of his death, and which was also the last lease granted previously to the making of the said will, bears date the 28th of May, 1744. A copy of this lease was annexed to the case, marked B. (It contained no clause respecting the grinding of corn at Orchard Mills.) cestui que vies mentioned in the last mentioned lease were all dead before the year 1828. Andrew's or Stanley's Tenement had been before demised by the ancestors of Charles, Earl of Egremont, by several leases, bearing date the 4th October, 1667, and the 6th September, 1716. Copies of these leases were annexed to the case. Andrew's or Stanley's Tenement in the year 1716 comprised a messuage and tenement containing about ten acres of land. lease of 28th May, 1744, comprised a part only of that tenement. And the lease of 29th September, 1828, comprised a \*part only of that comprised in the lease of 28th May, 1744. The leases of 1667 and 1716 contained a reservation for the tenant's doing suit at Orchard Mills by grinding his corn, grain and malt expended on the premises there. These mills formed part of the estate of the said Sir W. Wyndham, and passed by the above-mentioned devise in the said will of Charles, Earl of Egremont.

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The predecessors in estate of Charles, Earl of Egremont, granted a lease of Crang's Tenement, dated 4th October, 1700, which lease was not determined at the time of the making of the will of Charles, Earl of Egremont, and of his death. A copy of this lease was annexed to the case. (It was by deed, and contained, in the reddendum, the clause following. "And also doing suit to the mills called Orchard Mills, by grinding at the said mills all such his and their corn, grain and malt, as during the term aforesaid shall be expended on the premises: and it is hereby intended and meant that the miller there for the time being shall not take Another lease of Crang's Tenement for ninetyexcessive toll.") nine years, determinable on three lives, was granted by the testator, dated 25th March, 1757, in reversion of the lease of 4th October, 1700, of the same premises. The cestui que vies mentioned in the lease of 1757 were dead before the year 1828. The original lease of 1757 has been lost; but it is referred to in a subsequent lease of the same property, dated 1st March, 1767; a copy of which was annexed to the case.

The next preceding lease of Wakefield's was dated 10th July, 1750; and the next preceding lease of Stone's was dated 10th

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May, 1750. Both of them were granted \*by Charles, Earl of Egremont; and neither of them contained any clause for doing suit at the mill.

The rent and heriots reserved in the lease to the defendant of 29th September, 1828, are in fair proportion in point of value to the rents and heriots which had formerly been reserved in respect of all the four tenements.

The following evidence, given by the defendant, was objected to by the counsel for the plaintiff, and was admitted, subject to the opinion of this Court as to its admissibility.

Sir W. Wyndham, the father and immediate predecessor of Earl Charles, held several tenements within the manor of Williton Regis (within which the premises in question are situate), similar to Stanley's and Crang's Tenements. Sir William and his guardians (during his minority) granted thirty-one leases (all being for years determinable on lives) of such premises; that is to say, the guardians granted five, and Sir William himself twenty-six, of the said leases.

The five granted by the guardians all contain a reservation of suit of mill in the following words and form. "1. And also doing suit to the mills of the said Sir William Wyndham, his heirs and assigns, called Orchard Mills, by grinding at the same mills all such corn, grain and malt as, during the term aforesaid, shall be expended on the premises. And it is hereby intended and meant that the miller there for the time being shall not take excessive toll."

One of the same five leases also contains the following clause. "2. And shall and will well and truly yield, pay, do and perform all and every the rents, heriots, \*sum and sums of money for heriots, and other reservations, suits and services, before in these presents mentioned, in such manner and form as they are limited to be paid and performed; and also all such other rents, customs, suits and services that have been heretofore of right done, paid or performed, for or in respect of the premises or any part thereof."

Another contains the same clause, omitting the word "heriots" after the word "rents."

And the three remaining leases contain the following clause. "3. And shall and will also yield, pay, do and perform all and every the rents, heriots, sum and sums of money for heriots, and other reservations, suits and services, before in these presents contained or mentioned, in such manner and form as they are

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limited to be paid and performed, and also all such reasonable fines, pains and amerciaments as during the term aforesaid shall be imposed, assessed or incurred at any the said Court or Courts on him the said Peter Luckwell the elder, his executors, administrators or assigns, or any of them, either for default of suit of Court, or for not grinding at the said mills, or for not repairing the said premises or any part thereof, or for any other reasonable cause whatsoever.

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Of the twenty-six leases granted by Sir William Wyndham himself, in fourteen thereof he omitted the clause, No. 1, and continued it in the remaining twelve leases. In five of the leases, he also omitted the clauses Nos. 2 and 3, and continued the clause No. 2 only in the remaining twenty-one leases, with the exception of the word "heriots" after the word "rents," in ten of those leases.

In none of the thirty-one leases granted by Sir William \*Wyndham and his guardians was there any formal covenant to do suit at the mill, independently of the above clauses.

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The Earl Charles not only continued the omissions of suit of mill made by his predecessors, but also, in the seventeen instances where they had preserved the reservation of that suit, upon regranting the premises demised thereby he altogether omitted the reservation in sixteen of the leases; and the seventeenth is the lease of Crang's Tenement, which has been lost.

The Court, at the request of either party, was to turn the facts into a special verdict, and was to be at liberty to draw any inference from the facts which a jury might have done.

If the Court should be of opinion that the plaintiff was entitled to recover, on the demise in the declaration, the said tenements called Stanley's Tenement and Crang's Tenement, or either of them, or any part thereof, the verdict entered for the plaintiff was to stand. If the Court should be of opinion that the plaintiff was not entitled to recover the said tenements, or any part of them, then the verdict was to be entered for the defendant.

The further question for the Court was, whether the defendant was entitled to have a verdict entered for her in respect of Stone's Tenement and Grayborough; if so, the verdict was to be entered accordingly.

The case was argued in last Hilary Term (1).

(1) January 23rd and 26th, 1844. Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.

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Erle, for the plaintiff:

The first objection to the lease of 1828 is explained by the four following objections. \*As the facts are found, the objections do not apply to Stone's Tenement or Grayborough: the plaintiff therefore claims only Andrew's (or Stanley's) Tenement, and Crang's Tenement.

As to the second objection. The words of the power as to leases for life or lives authorize the letting only of "any part of the said premises usually so leased." The subject of this lease has never before been so leased: the several parcels of which it consists have been let in distinct leases; and some of these parcels are no "part of the said premises" at all. That this avoids the lease, appears from the language of the Court in Doe d. Douglas v. Lock (1), and from the decisions in Doe d. Vaughan v. Meyler (2) and Doe d. Bartlett v. Rendle (3). In Doe d. Williams v. Matthews (4) a tenant for life, having power to lease certain lands on the rents formerly reserved, made a lease of those and other lands which had been excepted from the power, at a single rent; and it was held that the rent could not be apportioned, and that the lease was void as to the whole. "Strictness on this head has been carried so far, that it has been considered that two several farms not usually let together, could not be joined in one demise with a reservation of one and the same rent; nor a parcel of a farm rendering rent pro rata:" 2 Sugd. Pow. 409 (5). For this Lord Mountjoy's case (6) is referred to: and it is true that this case has been overruled in Doe d. Earl of Shrewsbury v. Wilson (7), so far as relates to \*the division of property all of which is within the But the annexation of land not within the power, and letting the whole at a single rent, has never been sanctioned. Stat. 39 & 40 Geo. III. c. 41, s. 1, authorizes the division of tenements, though not the uniting, in leases by ecclesiastical bodies: but the inference from this is rather against the right, under a power, and independently of statute, to divide tenements before joined, or to join those before demised separately. In Orby v. Mohun (8) it seems to have been admitted that, under a power like this, lands not usually demised could not be joined in a lease with lands usually demised.

[ \*220 ]

(5) 7th ed.

<sup>(1) 41</sup> R. R. 496 (2 Ad, & El. 705, 747).

<sup>(2) 15</sup> R. R. 244 (2 M. & S. 276).

<sup>(6) 5</sup> Co. Rep. 3 b, 5 b. (3) 15 R. R. 426 (3 M. & S. 99).

<sup>(7) 24</sup> R. R. 423 (5 B. & Ald. 363),

<sup>(4) 39</sup> R. B. 485 (5 B. & Ad. 298).

<sup>(8) 2</sup> Vern. 531, 542.

As to the third objection. No portion of the rent being specifically assigned to the particular portions demised, it cannot be said that the ancient rents are reserved.

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As to the fourth objection. The power requires that "no clause or clauses be contained in any of the said leases giving power to any lessee to commit waste, or exempting him, her or them from punishment for committing the same." Now the lease permits the lessee to pull down the outhouses in Crang's Tenement. waste: and it makes no difference that the materials are to be employed in rebuilding a new house. It is waste either to pull down a house on a copyhold or to build a new one: Com. Dig. Copyhold (M 3). Even where the substitution of the new building for the old one is an improvement, it is waste: Cole v. Green (1), note (11) to Greene v. Cole (2), City of London v. Greyme (3), 2 Rol. Abr. 815, Wast. pl. 18, 19. The amount of the deterioration \*might be a distinct question, as in Doe d. Earl of Darlington v. Bond (4). It is true that the lease contains a general covenant against waste: that, however, will not controul the effect of the express permission.

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As to the fifth objection. The "usual and reasonable covenants" are not contained in the lease of 1828. The test, as to what covenants are usual and reasonable, is the latest lease before the execution of the will. That was the lease of 1757, so far as Crang's Tenement is concerned. But, that lease being lost, the lease to be looked to is the latest prior lease which exists; and that is the lease of 1700, which contains the clause respecting the suit at Orchard As to Andrew's Tenement, the lease in existence at the time of making the will certainly did not contain the clause in question: that, however, may possibly have been because the tenements had been divided: the older leases of lands in the manor in which this property lies did contain the clause. But, if the Court shall think that, as to Andrew's Tenement, the lease of that portion existing at the date of the will might be followed, still the objection as to Crang's Tenement is fatal to the whole lease. The attempt on the other side will be to interpret the words "usual and reasonable" by the custom of the country, or the reservations usually made in leases of other property of the same owner. In Doe d. Douglas v. Lock (5) the power required (6) that the leases should be made "so

<sup>(1) 1</sup> Lev. 309.

<sup>(2) 2</sup> Wms. Saund. 259. See note (a)

b. (6th edit.), Simmons v. Norton, 33

R. B. 588 (7 Bing. 640).

<sup>(3)</sup> Cro. Jac. 182.

<sup>(4) 29</sup> R. R. 436 (5 B. & C. 855).

<sup>(5) 41</sup> R. R. 496 (2 Ad. & El. 705).

<sup>(6) 41</sup> R. R. 498 (2 Ad. & El. 707).

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as the ancient and accustomed vearly rent and reservations be thereby reserved," and also "with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind, in the several and respective parishes and \*places where the same premises are situated." The Court pointed out (1) that this power contained two sets of provisions; and that, as to the second. the course and custom of covenants, &c., in leases of other property in the same places respectively must be looked at; but that the first provision must be satisfied independently of this, and it was only after ascertaining that the first provision was satisfied that inquiry was to be made with respect to the second. Here no reference is made to the covenants usual in leases of other property; and the rule of looking to the last existing lease must prevail, as in Orby v. Mohun (2).

Kelly, contrà:

None of the objections pointed to by the first objection can be maintained.

The second objection is not raised by the facts of the case. The words "so leased" refer, not to the uniting or severing of tenements, but to the manner of leasing, that is, "in possession or reversion" &c. The fifth resolution in Lord Mountjoy's case (3) is overruled expressly in Doe d. Earl of Shrewsbury v. Wilson (4), which cannot be distinguished from the case now before the Court, since it can no more be a violation of a power to unite tenements formerly divided than to divide tenements formerly united: the latter, indeed, would appear to be the more objectionable proceeding, since it limits the power of distress, whereas the former enlarges it by enabling the landlord to distrain on any part of the whole premises demised if any portion of the rent be in arrear.

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As to the third objection, it is argued, as in Lord Mountjoy's case (5), that the usual rents cannot be said to be reserved. But the finding here meets the objection; for it is said that the proper proportion has been observed. In the passage in Sugden on Powers (6), the author treats the question respecting ecclesiastical leases as having been doubtful before stat. 39 & 40 Geo. III. c. 41. It may also be observed that in Lord Mountjoy's case (7) much

<sup>(1) 2</sup> Ad. & El. 734, 735.

<sup>(2) 2</sup> Vern. 531, 542.

<sup>(3) 5</sup> Co. Rep. 5 b.

<sup>(4) 24</sup> R. B. 423 (5 B. & Ald. 363).

<sup>(5) 5</sup> Co. Rep. 3 b, 6 a.

<sup>(6)</sup> Vol. ii. p. 409, 7th edit.

<sup>(7) 5</sup> Co. Rep. 6 a.

stress was laid on the tenure being copyhold, which is not the case here. In Smith v. Bole (1) an ecclesiastical lease was held to be void, because it did not except the trees, as the former leases did, so that more was let than before: but the reason given shows that the decision is inapplicable here; for it was said that the rent was not the ancient rent; and, in fact, the same sum of money, 17l., was reserved as before; that is, more was let but not more paid. Here the proportion is preserved. Doe d. Bartlett v. Rendle (2) appears to lay down merely the doctrine in Lord Mountjoy's case (3), and, so far, to be overruled by Doe d. Earl of Shrewsbury v. Wilson (4).

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As to the fourth objection, there is not a permission to commit waste. It does not appear that the premises will be deteriorated: indeed the contrary is presumable. The case not finding deterioration, either by injury to the property or destruction of evidence of title, there is no waste: Doe d. Grubb v. The Earl of Burlington (5).

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As to the fifth objection, the clause respecting \*suit to the mill in the old leases is not a covenant at all: it is a reservation: Doe d. Douglas v. Lock (6). The reservation did not exist in the last lease of Andrew's Tenement; nor is it shown to have existed in the lease of Crang's Tenement last preceding the will; and in most of the leases made by the creator of the power there was no such reservation.

## Erle, in reply:

As to the second and third objections. In Co. Litt. 44 b, Lord Coke, speaking of stat. 32 Hen. VIII. c. 28, s. 2, says: "If twenty acres of land have been accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the accustomable yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the Act, for that the accustomable rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole." The difficulty becomes greater when, as here, there are reservations of heriots, which cannot be subdivided or apportioned.

As to the fourth objection, Doe d. Grubb v. The Earl of

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<sup>(1)</sup> Cro. Jac. 458.

<sup>(2) 15</sup> R. R. 426 (3 M. & S. 99).

<sup>(3) 5</sup> Co. Rep. 3 b. 6 a.

<sup>(4) 24</sup> R. R. 423 (5 B. & Ald. 363).

<sup>(5) 39</sup> R. R. 549 (5 B. & Ad. 507).

<sup>(6) 41</sup> R. R. 496 (2 Ad. & El. 705, 743).

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Burlington (1) is relied upon on the other side. But there the waste was negatived. Primâ facie, as was there laid down, the alteration of a building is waste. The lessee might pull down the barn, and die before the new building was begun.

As to the fifth objection, the reservation, occurring in a deed, is a covenant in law.

Cur. adv. rult.

[ 225 ] LORD DENMAN, Ch. J., in this Term (May 27th), delivered the judgment of the Court:

The question in this case was the validity of a lease for ninetynine years, determinable on three lives, granted by the late Earl of Egremont to Mary Stephens on the 29th September, 1828.

The lease comprised four tenements: 1st. Andrew's or Stanley's, 2nd. Stone's, 3rd. Crang's, 4th. Grayborough, parcel of Wakefield's.

Lord Egremont was tenant for life under the will of his father. dated July, 1761, of certain estates, part of the estate of the late Sir William Wyndham, and had power to demise for years, determinable on one, two or three lives, any part of the premises usually so leased, by lease reserving the ancient and accustomed rents and heriots, and containing the usual and reasonable covenants, and not containing any clause giving power to the lessee to commit waste or exempting him from punishment for committing the same. It appears by the case that the tenements called Andrew's and Crang's were part of the estate of Sir William Wyndham: but Stone's and Grayborough were not shown to have Those two must therefore be taken not to be within the power: and, as to them, the plaintiff must fail, because, upon the facts stated in this case, it does not appear what estate the late Lord Egremont had in them at the date of the lease in question; and, as the present lessor of the plaintiff could only claim them as heir-atlaw to the late Lord, he would by that very claim show the late Lord to have been seised in fee, and of course to have been able to demise them in any way he thought fit.

[ 226 ] Four objections were made to the lease (2).

- 1. That it comprises tenements within the power and others not within it, and, therefore, that the power is not well executed.
  - 2. That, even if all the tenements had been within the power,
- (1) 39 R. R. 549 (5 B. & Ad. 507). with the numbering in the case and (2) The objections, as numbered in the judgment, do not correspond

they had always been leased separately, and, therefore, had not been "usually so leased" as now, within the meaning of the power.

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- 3. That the lease gives power to the lessee to commit waste.
- 4. That it does not contain the usual and reasonable covenants, for it omits a covenant to grind at the lord's mill.

The first objection appears to us to be very formidable. It is not merely that tenements not before letten together had been joined at an entire rent, or that premises had been severed and divided which were before letten together at pro ratû rents, where all were parcel of the same estate, and under the same power. But it is mixing and joining, at an entire rent, premises under the power and others to which the power does not extend. It is true that the case finds that the rents and heriots reserved are in fair proportion, in point of value, to the rents and heriots which had been formerly reserved in respect of all the four tenements; but that finding could only assist in respect to the second objection, and indeed is not very consistent with the supposition that two out of the four tenements are not within the power at all. The authorities cited, especially The Earl of Cardigan v. Montague in the Appendix \*to Sugden on Powers (1), Doe d. Bartlett v. Rendle (2), and others which are commented on in Doe d. Douglas v. Lock (3), establish the position that the mere joining of strange tenements at an entire rent is fatal to the lease (4). And, if the tenements called Stone's and Grayborough are taken to have been held in fee-simple by the late lord, there would be no ancient and accustomed rent as to them; and it is difficult to see how the small rent (5) reserved by the lease in question could be apportioned.

To the second objection it was answered in argument that tenements which are all under a power may be joined and separated ad libitum, provided the due proportion of rent be reserved; and the case of Doe d. Earl of Shrewsbury v. Wilson (6) was relied on. We are inclined to think that the answer is sufficient: and we are of opinion that the words "usually so leased," on which that objection was much founded, relate to the time and duration of the lease, not to the joining or separating the premises.

We think there is nothing in the third objection. Whether the

[ \*227 ]

<sup>(1)</sup> No. 13. Vol. ii. p. 551, 7th edit.

<sup>(2) 15</sup> R. R. 426 (3 M. & S. 99).

<sup>(3) 41</sup> R. R. 496 (2 Ad. & El. 747).

<sup>(4)</sup> See, however, Sugdenon Powers, 8th ed. 809, 810.

<sup>(5)</sup> Fourteen shillings yearly, exclusive of the sum paid on the renewal, and of the heriots.

<sup>(6) 24</sup> R. R. 423 (5 B. & Ald. 363).

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taking down the outhouse and using the materials to build a house would or would not be waste, if not authorised to be done by the reversioner, we are of opinion that the contract and permission so to do is not a clause giving power to the lessee to commit waste within the meaning of the leasing power in question.

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The fourth objection depends upon this, what are the usual and reasonable covenants contemplated by the \*power? general rule is to take as a guide the lease in existence at the time of the creation of the power. In this case, as far as regards Andrew's Tenement, that lease was dated in 1744, the power being created in 1761, by the then Lord Egremont, who had himself granted the lease of 1744, by his then name of Sir Charles Wynd-It is silent as to suit at the mills: and, although the prior leases contain a reservation of that suit, yet the lease of 1744 did not comprise all the tenements which those prior leases did, and, being granted by the person who created the power, we think well warranted the omission of suit to the mills in the lease of 1828. As to Crang's Tenement the case is different. There were two leases of it in existence at the time of the creation of the power, viz. the lease of 1700 and that of 1757: the latter is lost; and the contents are unknown, though it is stated as existing in a lease of 1767, which was after the creation of the power and the death of the Lord Egremont who created it. The lease of 1700 does contain a reservation of suit at the mills, and a covenant to perform the suit so reserved. We think it impossible, therefore, to say that such covenant was not one of the usual and reasonable covenants: and then the omission of it in the lease of 1828 is fatal to the whole ease. This decision is wholly independent of the question, whether the evidence of the thirty-one leases was receivable or not. would have been the same if they had not been received.

Upon the whole, therefore, as well on the first objection as the fourth, we think the lessor of the plaintiff entitled to the judgment of the Court.

Judgment for plaintiff(1).

(1) See the next case.

#### DOE D. LORD EGREMONT v. BURROUGH.

(6 Q. B. 229-233; S. C. 13 L. J. Q. B. 357; 8 Jur. 954.)

1844. Jan. 26. May 28.

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Power, under a will, to tenant for life to grant leases, so that in every such lease there be contained the usual and reasonable covenants, and "a condition of re-entry for nonpayment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained."

Lease, with a covenant to repair, and proviso for re-entry if the tenant should suffer the premises to be out of repair, and should not repair the same "within six calendar months next after notice:"

Held, void, as a bad execution of the power.

EJECTMENT for lands in Devonshire. On the trial, before Cresswell, J., at the Devonshire Summer Assizes, 1842, a verdict was found for the plaintiff, subject to the opinion of this Court upon a special case, the material parts of which were as follows.

Charles, Earl of Egremont, before and at the date of his will, bearing date 31st July, 1761, and from thence to the time of his death, was seised in his demesne as of fee of the premises mentioned in the declaration, and, being so seised, by his said will devised all his manors, lands, &c., and parts and shares of manors, lands, &c., in the county of Devon, of which the premises mentioned in the declaration were part, to his second son, Percy Charles Wyndham, and his assigns, for life, with remainders over.

The will contained a power to demise, in the same terms with the power set out in *Doe* d. *Lord Egremont* v. *Stephens* (1), and containing this clause. "And so that there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more, and so that in every of the leases, so to be made and granted by virtue of the several powers aforesaid, there be contained the usual and \*reasonable covenants, and a condition of re-entry for non-payment of the rent or rents thereby respectively to be reserved, in case the rent or rents be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained."

[ \*230 ]

Percy Charles Wyndham, being such tenant for life, made and executed three several indentures of lease, each bearing date 16th August, 1796, and made between the said P. C. Wyndham of the one part, and William Guppy of the other part.

Copies of the leases were annexed to the case. Each lease (for

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ninety-nine years, determinable on certain lives) contained a covenant by Guppy, for himself, his executors, &c., to repair the demised premises, and maintain, uphold, &c., and a proviso for re-entry "if the said William Guppy, party hereto, his executors," &c., "shall suffer the said demised premises, or any part thereof, in any manner to run to ruin or decay for want of the reparations," &c. "aforesaid, and shall not sufficiently repair," &c. "and amend the same within six calendar months next after notice shall be given by the said P. C. Wyndham and his assigns, or other persons successively entitled as aforesaid for the time being, their heirs or assigns, to the said W. Guppy, party hereto, his executors, administrators or assigns, or tenant on the premises."

The leases of the premises comprised in the two first mentioned indentures, existing when the will was made, and which were the leases last granted before making the will, bore date in 1751, and were annexed to the case. They contained provisoes avoiding the respective leases in case the tenant, his executors, &c., should permit and suffer the premises to be ruinous and in \*decay for want of reparations, without any mention of notice.

Some older leases of these premises respectively (dates, 1674, 1674, 1706, 1713, 1713), and one lease of the premises comprised in the third indenture (date 1690), were also annexed to the case, containing provisoes of re-entry in case of waste to the value of 10s. (1), if not amended or compensation made within one, two and three months (2) after notice, no sufficient distress being found.

Particulars of objections to the three first mentioned leases were delivered under a Judge's order; and (so far as material to the present decision) were:

That the terms and provisions of the power of leasing contained in the will of Charles, Lord Egremont, and under which will the said P. C. Wyndham deceased was at the time of making the said alleged leases tenant for life of the premises therein expressed to be demised, were not pursued in making the said leases, and that the same were and are void against the remainder man. "And the particular objections thereto are that the said several leases do not respectively contain conditions of re-entry for non-performance of the several covenants therein respectively contained, as required by

(1) The proviso in the three earlier leases was, in case of waste done or wilfully suffered; in the three later, of waste done or committed. The leases of 1713 made the proviso attach in

case &c., as above, and "if no sufficient distress" "can or may be found," &c.

<sup>(2)</sup> The leases of 1674 gave one month; that of 1690 three; the others two.

the said power. That the said several leases respectively do not contain conditions of re-entry for non-payment of the rents in the same leases respectively contained in case the same be behind or unpaid by the space of \*twenty-one days, as required by the said power." That the leases omit usual and reasonable covenants. namely to do suit and service at the manor Courts, &c. And that the leases give power to the lessee to commit waste, and exempt him from punishment for committing the same.

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The question for the opinion of the Court was, whether, under the above circumstances, the said leases of August 16th, 1796, or any or either of them, were or was void as not authorized by the power. If the Court should be of opinion the said leases or any or either of them were not authorized by the power, the verdict entered for the plaintiff was to stand for all or for part of the premises contained in the declaration, as the case might be. If otherwise, the verdict to be entered for the defendants. The case was argued in last Hilary Term (1).

Erle, for the plaintiff, contended that the leases varied materially from the terms of the power, inasmuch as they prevented the landlord from re-entering for breach of the covenant to repair till the expiration of a six months' notice; a restriction for which no precedent appeared in the former leases. (The argument on other points is rendered immaterial by the judgment of the Court.)

## Cockburn, contrà :

Powers of this kind have in late times been construed liberally, and with a reasonable regard to the intention; and on this principle of construction a majority of the Judges, in Smith v. Doe d. \*Jersey (2), decided that a power (3) to lease, "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved," was well executed by grant of a lease with proviso for re-entry if the rent should be behind &c. by the space of fifteen days, and no sufficient distress to be found on the premises. The clause here introduced is a usual one in

[ \*233 ]

<sup>(1)</sup> January 26th, 1844. Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.

<sup>(2) 22</sup> R. R. 19 (2 Brod. & B. 473; 3 Bligh, 290); in Dom. Proc., reversing the judgment of the Exchequer

Chamber in Doe d. Jersey v. Smith, 1 Brod. & B. 97, and affirming that of the King's Bench in Doe d. Earl of Jersey v. Smith, 5 M. & S. 467.

<sup>(3)</sup> See 1 Brod. & B. 101, 106.

DOE d. LORD EGREMONT v. BURROUGH. leases. The object contemplated by the power was, not to punish the tenant, but to secure the remainder man. It is enough if the proviso be one which insures performance of the covenant.

Erle, in reply:

The test, what is reasonable and usual, is decisive against these leases. The lessor could not turn an absolute covenant into a qualified one.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 28th), delivered the judgment of the Court:

We are of opinion that the lease in this case cannot be supported. The power requires that there should be a clause of re-entry for non-performance of the covenants to be contained in the lease. The lease contains a general covenant to repair and keep in repair: the clause of re-entry is in case the lessee shall not repair after six calendar months' notice. This appears to us to be clearly not a compliance with the power, and to entitle the lessor of the plaintiff to our judgment.

Judgment for plaintiff.

1844. Jan. 13,

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# WOOD AND OTHERS v. TASSELL (1).

(6 Q. B. 234-236.)

Plaintiff bought of defendant, and paid for, hops which lay at the warehouse of F., having been placed there by a party who had sold them to defendant. After the sale, plaintiff was informed that the hops were at F.'s, had them weighed there, and took away part. Some days after, he applied for the residue; but they had been taken away in the meantime by a creditor of the first seller. Defendant had not given plaintiff a delivery order, nor had he demanded one:

Held that F. had the residue of the hops in his possession as agent to plaintiff, and that defendant was not liable to plaintiff for the non-delivery of them.

Therefore, plaintiff having brought assumpsit for the non-delivery, and defendant having pleaded that he did deliver: Held a misdirection to leave it to the jury whether defendant ought to have given plaintiff a delivery order.

Assumpsit. The first count alleged that heretofore, to wit on &c., plaintiffs, at the request of defendant, bargained with defendant to buy of him, and defendant then sold to plaintiffs, twenty-six bags of hops at 6l. 17s. per cwt., and six bags one pocket of hops at 6l. 6s. per cwt., to be delivered by defendant to plaintiffs at their

(1) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29.—A. C.

Wood v. Tassell.

request, and to be paid for by plaintiffs to defendant on request: and, in consideration thereof, and that plaintiffs had then undertaken &c. to accept and receive the hops, and to pay defendant for the same at the price aforesaid, defendant then promised plaintiffs to deliver the said hops to them as aforesaid. And, although plaintiffs afterwards, and in pursuance of the said bargain and sale, to wit on &c., paid to defendant the said price for the said hops, amounting to &c., to wit 570l. 18s. 6d., and although plaintiffs then, to wit on &c., requested defendant to deliver to them the said hops according to defendant's said promise, and although plaintiffs were then, and at all times from the making of the said bargain and sale and promise hitherto, ready and willing to accept and receive the hops, and although defendant afterwards, to wit on &c., delivered to plaintiffs a part, to wit twenty-six bags, of the said hops, and although a reasonable time from the making of the said promise for the delivery of the whole of the said hops had elapsed before the commencement of this suit, of all which &c. (notice to defendant); \*yet defendant, not regarding &c., did not nor would, when so requested &c., or at any other time &c., deliver the residue of the said hops, to wit, the said six bags and one pocket of the said hops, or any part thereof, to plaintiffs, but wholly neglected &c.: whereby defendants have lost &c. divers great gains &c.

[ \*235 ]

Counts for money had and received, and on an account stated.

Pleas 1. Non assumpsit. Issue thereon.

2. To the first count, that defendant did, within a reasonable time from the making of the said promise for the delivery of the said hops, to wit on &c., deliver to plaintiffs the said residue of the said hops in the declaration mentioned: conclusion to the country. Issue thereon.

On the trial, before Lord Denman, Ch. J., at the London sittings after Michaelmas Term, 1842, a verdict was found for the plaintiffs. In Hilary Term, 1843, *Erle* obtained a rule *nisi* for a new trial, on the ground (among others, which need not be specified) of misdirection. In last Hilary Term (1),

Kelly and Butt showed cause, and Erle supported the rule. The judgment contains all that requires to be noticed in the report.

Cur. adv. vult.

<sup>(1)</sup> January 13th, 1844. Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.

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LORD DENMAN, Ch. J., in this Term (May 22nd), delivered the judgment of the Court:

This action was brought for non-delivery of six bags of hops bargained and sold by the defendant to the plaintiffs, and paid for by them. The defence was that \*they were delivered according to the contract, though the plaintiffs never received them. They were parcel of a larger quantity, and lay at the warehouse of one Fridd, with whom they had been deposited by the former owner, who sold them to Tassell. After the sale to the plaintiffs was complete, the plaintiffs were informed that they were at Fridd's: they had them weighed there, sent to Fridd for part of them, and received that part. When they sent for the remainder, at the distance of several days, they were gone, a creditor of the earlier vendor having claimed the right to them and removed them.

We think it unnecessary to enter into a minute examination of authorities (1), because, on the facts, it is clear that the plant tiffs knew that the hops were lying at Fridd's to their use, and might, by applying to Fridd, have obtained the remnant now in dispute, as they had the other part. The defendant had done all he was bound to do, and cannot be responsible for Fridd's wrongful delivery of them to another. This was the view which I took at the trial, though I was induced by some degree of importunity to leave it as a question to the jury whether the defendant ought to have given the plaintiffs a delivery order, though not expressly required, in performance of his contract. We all think that I was wrong in so submitting the matter to them, and that the correct course would have been to direct them that, under the circumstances, Fridd held the hops as agent for the plaintiffs.

Rule absolute.

1844. June 7.

### GIFFORD v. WHITTAKER.

(6 Q. B. 249-252; S. C. 13 L. J. Q. B. 325; 8 Jur. 1134.)

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Plea, to assumpsit for money paid, &c.:

That, before action brought, defendant gave plaintiff, and he received from defendant, authority to receive, for defendant and as his agent, moneys exceeding the sum in the declaration mentioned, then due to defendant, and to pay himself thereout in full satisfaction and discharge of the

(1) The following were referred to in argument: Dixon v. Yates, 39 R. R. 489 (5 B. & Ad. 313); Harman v. Anderson, 11 R. R. 706 (2 Camp. 243); Lucas v. Dorrien, 18 R. R. 480 (7 Taunt.

278); Coe v. Clay, 30 R. R. 699 (5 Bing. 440); Hammond v. Anderson, 8 R. R. 763 (1 Bos. & P., N. R. 69); Stonard v. Dunkin, 11 R. R. 724 (2 Camp. 344).

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promises &c. and of all damages &c.; and defendant at the time of giving such authority did at plaintiff's request entrust him with the sole collection of the said moneys, on the terms, then assented to by plaintiff and defendant, that plaintiff should use reasonable diligence in endeavouring to collect the same, and defendant should not collect or endeavour to collect them otherwise than by plaintiff's agency so created as aforesaid; that afterwards, and before action brought, plaintiff had the option of receiving, and might and ought to have received, the said moneys, to an amount exceeding the present demand, in pursuance of the said authority, and had also the option of paying himself, out of the moneys which he might have so received, the amount now claimed, in such satisfaction &c.; and that plaintiff did not nor would use reasonable diligence &c. in endeavouring to collect and receive the said moneys when he might have so received, and had the option of so receiving the same, but, while the said authority was in force, so negligently conducted himself in endeavouring to collect and receive the said moneys, that by reason thereof he did not receive the same, or any part thereof, and thereby, and without defendant's default or consent, before action brought, the chance of the moneys or any part thereof being received by or on behalf of defendant became desperate, and the said moneys thereby were and are lost to him:

Held, on general demurrer, a bad plea of accord and satisfaction.

Assumest for money paid, money lent and interest, and on an account stated.

That, before the commencement of this suit, to wit on Plea 2. &c., defendant gave to plaintiff, and plaintiff then received from defendant, authority to receive for and as the agent of defendant certain moneys to a large amount, to wit to an amount exceeding the moneys in the declaration mentioned, then due to defendant, and out of those moneys to pay himself, the plaintiff, money, to wit to the amount of the moneys in the declaration mentioned, in full satisfaction and discharge of the promises in the declaration mentioned, and of all damages that might be by the plaintiff sustained by reason of the non-performance thereof; and defendant then, at the time of giving the said authority, did at plaintiff's request entrust plaintiff with the sole collection of and endeavouring to collect the said moneys, upon the terms, then assented to both by plaintiff and defendant, that plaintiff should use reasonable care, diligence and skill in endeavouring to \*collect and receive the said moneys, and that defendant should not collect or receive, or endeayour to collect or receive, the said moneys otherwise than by the agency of the plaintiff so created and authorised as aforesaid. afterwards, and before the commencement of this suit, to wit on &c., plaintiff had the option of receiving, and then might and ought to have received, the said moneys to a large amount, to wit to an amount exceeding the moneys in the declaration mentioned, in pursuance of the said authority and trust, and had then also the

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option of paying himself, the plaintiff, out of the said moneys which he might so have received, the amount of the moneys in the declaration mentioned, in such satisfaction and discharge as aforesaid: Averment that plaintiff did not nor would use reasonable care, diligence and skill in endeavouring to collect and receive the said moneys or any part thereof, when he might so have received the same as aforesaid and had the option of so receiving the same, but, on the contrary thereof, then, while the said authority and trust were in full force, and not in any way renounced by plaintiff, and after the making of the promises in the declaration mentioned, so carelessly, negligently and unskilfully conducted himself in endeavouring to collect and receive the said moneys, that by reason thereof plaintiff did not receive the said moneys nor any part thereof, and thereby, and without any act or default of defendant, and without the privity or consent of defendant, then, before the commencement of this suit, to wit on &c., the chance of the said moneys or any part thereof ever being received by or on behalf of defendant became and was wholly desperate, and the said moneys were thereby \*then, and still are, wholly lost to the defendant. Verification.

General demurrer. Joinder. The ground of demurrer stated in the margin was, that the plea professes to be pleaded by way of discharge and satisfaction, but shows no discharge or satisfaction, nor any other answer.

The Court now called upon

### IV. H. Watson for the defendant:

The authority given to the plaintiff had the same effect as if the defendant had placed a cheque in his hands for the amount due; in which case the plaintiff would have been bound to use proper diligence in obtaining payment, and to apprise the defendant if the cheque were dishonoured: Chamberlyn v. Delarive (1).

(Coleridge, J.: In the case of a cheque given would not payment be pleaded? (2).)

The delivery of a cheque would not be a satisfaction in itself. It only suspends the remedy till the time of payment. If the giving

<sup>(1) 2</sup> Wils. 353. See Griffiths v. 365; Hough v. May, 43 R. R. 530 (4 Owen, 13 M. & W. 58. Ad. & El. 954).

<sup>(2)</sup> See Pearce v. Davis, 1 Moo. & Rob.

of a cheque were pleaded, dishonour would be an answer. The laches here is as plain as in Chamberlyn v. Delurive (1); the plea WHITTAKER, avers that the plaintiff had the option of receiving the money and paying himself out of it, but did not use due diligence in so doing. and thereby, without default in the defendant, the chance of recovering became desperate, and the money lost. transaction here is like the assignment of a debt: the defendant had money due to him, and gave the defendant an irrevocable authority to receive it. An assignment of a debt is good consideration for a promise, and may likewise be a consideration for the discharge of a liability.

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Montagu Smith, contrà, was not heard.

LORD DENMAN, Ch. J.:

Clearly this is no accord and satisfaction.

Patteson, Williams, and Coleridge, JJ. concurred.

Judgment for plaintiff.

# WAKEFIELD v. NEWBON AND OTHERS (2).

(6 Q. B. 276-282; S. C. 13 L. J. Q. B. 258; 8 Jur. 735.)

1844. April 16. May 27.

[ 276 ]

The mortgagee of lands handed over the deeds to his attorney. mortgagor paid the principal and interest, and the lands were reconveyed to him:

Held, that the attorney could not retain the deeds against him, as a security for the expenses of the transaction due from the mortgagee to the

And that the mortgagor, having, under protest, paid such expenses to the attorney in order to get the deeds back, might maintain assumpsit for money had and received against the attorney for the money so paid:

And that the attorney was a principal in the transaction, and could not allege that the action should have been brought against the mortgagee.

Assumpsir for money had and received, and on an account stated. Plea: Non assumpsit.

On the trial, before Lord Denman, Ch. J., at the London sittings after Easter Term, 1848, the following facts appeared, according to the statement made by the LORD CHIEF JUSTICE in delivering the judgment of the Court as after mentioned.

"This action was brought by a mortgagor against the mortgagee's solicitors to recover a sum of money which the defendants had exacted from the plaintiff by refusing to re-deliver his title deeds after

(1) 2 Wils. 353. See Griffiths v. (2) Cited by Chitty, J., In re Llewellin Owen, 13 M. & W. 58. [1891] 3 Ch. 145, 149, 60 L. J. Ch. 732.

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a reconveyance \*to him of the mortgaged property on payment of principal and interest, unless the plaintiff would also pay the amount of the defendants' bill of costs. The verdict was taken for 111. 12s. 5d., the amount so exacted: but the defendants had leave to move for a nonsuit if the Court should think the action not maintainable, or for reduction of the damages to 5l. if the jury were wrong in deducting certain items from the bill (1). One of the charges was in respect of the reconveyance: but other parts of the bill arose exclusively from the relation of the mortgagee to the defendants, as client and solicitors."

In Trinity Term, 1843, *Platt* obtained a rule *nisi* accordingly. In Easter Term, 1844 (2),

The plaintiff does not complain as to the costs of the recon-

#### Knowles and Miller showed cause:

veyance. But all the money paid beyond those relates merely to a debt due to the defendants from their client; the mortgagee could not have recovered this against the plaintiff, and therefore the defendants cannot have a lien for it; for their right cannot extend beyond that of the mortgagee who delivered the deed to them: Ogle v. Story (4) will be cited for the Hollis v. Claridge (3). defendants. There the defendant was not the mortgagor, but had purchased from the mortgagor; and the Court seemed to rest their decision on the principle of caveat emptor. It seems to have been conceded that the plaintiff was indebted to the attorney in the full amount \*of the costs fairly incurred; the real question being whether he could dispute the fairness of the charges. The action appears to have been for the excess above the fair charges (5). Pratt v. Vizard (6) is in favour of the plaintiff.

(WIGHTMAN, J.: The client of the defendants there had no right

The Court said that the client could give no lien which he had not himself; and therefore that the lien could be supported only on the ground that the defendants were the plaintiff's solicitors, which the

(1) It is not thought necessary to detail the items.

to detain the title deeds at all.)

- (2) April 16th. Before Lord Denman, Ch. J., Patteson and Wightman, JJ. Williams, J. was sitting at the Central Criminal Court.
  - (3) 4 Taunt. 807. Stated 39 R. R.

662.

- (4) 4 B. & Ad. 735.
- (5) In the present case the defendants had made out a bill against the plaintiff; but the Court considered that circumstance unimportant.
  - (6) 39 R. R. 660 (5 B. & Ad. 808).

facts of the case negatived. In Harrington v. Price (1) a vendor of WAKEFIELD an estate retained the deeds, and afterwards raised a sum of money from another party, and deposited the deeds with him: and it was held that this party could not hold the deeds against persons claiming under the vendee.

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### Platt and Butt, contrà:

In Hollis v. Claridge (2) and Pratt v. Vizard (3) the clients of the defendants had no right to detain the deeds at all against the plaintiffs: the property was never actually conveyed away from the But Ogle v. Story (4) cannot be distinguished. plaintiffs. Court there considered that the party who purchased the mortgagor's interest stood exactly in the position of the mortgagor; and the question therefore was, whether the mortgagor could recover back the deeds which the mortgagee had handed over to the defendant: nothing turned on the amount.

(Wightman, J.: The amount was clearly material; for, when the \*mortgage is paid off, the mortgagor is at least entitled to recover the deeds subject to the lien.

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Here the amount is not to be limited as the plaintiff contends: but, even supposing that the sum paid was not all justly due from the plaintiff to the defendants, the action does not lie. It is assumpsit for money paid, under protest, upon duress of goods. Money so paid is not recoverable: Lindon v. Hooper (5), Brown v. M'Kinally (8). The plaintiff should have tendered the amount really due; and he might then have brought trover if the deed had been detained.

(Wightman, J.: Do you say only that money paid under duress of goods cannot be recovered where the complaint is merely that too much has been exacted, or do you put the proposition generally?)

Generally. The judgment in Skeate v. Beale (7) goes that length. The Court there refused to consider an agreement to pay money void which was extorted by duress of goods; and Lord Denman, Ch. J. said that, even if the money had been paid, no action for money had and received could have been sustained.

- (1) 37 B. R. 374 (3 B. & Ad. 170).
- (2) 4 Taunt. 807. Stated 39 R. R. 662.
- (á) 1 Cowp. 414.
- (6) 5 R. R. 739 (1 Esp. N. P. C. 279). (7) 52 R. R. 558 (11 Ad. & El. 983,
- (3) 39 B. R. 660 (5 B. & Ad. 808).
- 991).

(4) 4 B. & Ad. 735.

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(WIGHTMAN, J. mentioned Shaw v. Woodcock (1).

Miller: The principle of that case was acted on in Smith v. Sleap (2).)

Shaw v. Woodcock (1) seems to be overruled by Skeate v. Beale (3), which agrees with Lindon v. Hooper (4).

(PATTESON, J.: In Lindon v. Hooper (4) there was an illegal distress: a detainer is not quite the same thing.)

Every illegal detaining is a fresh taking: Evans v. Elliott (5). The Courts incline against reopening settlements of account: Wilson v. Ray (6). Further, even if the money \*be recoverable, the party to be sued is the mortgagee, the client of the defendants, and not the defendants, who received the money as representing the mortgagee: Stephens v. Badcock (7), Bamford v. Shuttleworth (8).

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 27th), delivered the judgment of the Court. After stating the facts as ante, p. 379, his Lordship proceeded as follows:

We are of opinion that the defendants were clearly wrong in withholding the deeds till the latter sum was paid: for it appears from *Hollis* v. *Claridge* (9), and is the known practice, that a mortgagee cannot, by handing over deeds to his attorney, create a new lien against the mortgagor in respect of a debt of his own.

But an objection to the maintenance of the action was drawn from certain expressions employed by me in a late judgment of this Court, Skeate v. Beale (3). That case was not alluded to in Parker v. The Great Western Railway Company (10), in the Common Pleas, where that Court, in conformity to a late decision of the Exchequer (11) and to some former decisions of this Court, laid down the principle that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received. In this Court, we were required, in considering a case of Ashmole v. Wainwright (12), to give some

- (1) 31 R. R. 158 (7 B. & C. 73).
- (2) 12 M. & W. 585.
- (3) 52 R. R. 558 (11 Ad. & El. 983, 991).
  - (4) 1 Cowp. 414.
  - (5) 5 Ad. & El. 142.
  - (6) 50 R. R. 341 (10 Ad. & El. 82).
- (7) 37 R. R. 448 (3 B. & Ad. 354).
- (8) 52 R. R. 542 (11 Ad. & El. 926).
- (9) 39 R. R. 662 (4 Taunt. 807).
- (10) 7 Man. & G. 253, 292.
- (11) Smith v. Sleap, 12 M. & W. 585.
- (12) 57 R. R. 817 (2 Q. B. 837).

attention to the doctrine in Skeate v. Beale (1). It was by no means WAKEFIELD unsupported by some ancient authorities; \*but perhaps it was laid down in terms too general and extensive. The case itself, however, was satisfactorily shown to be distinguishable, both from Ashmole v. Wainwright (2) and from the present case: and the principle just stated must be taken as well established and generally recognised. It may produce the inconvenience of a circuity of action: but the evil of allowing extortion by means of a wrongful detention of goods would be much greater; and the wrongdoer has no right to complain when he is compelled to restore money which he was warned that he had no right to extort. The case is wholly different from that class where the parties have come to a voluntary settlement of their concerns, and have chosen to pay what is found due.

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A third defence was rested on the case of Bamford v. Shuttleworth (3), where a purchaser had paid the agreed price of an estate to the vendor's attorney, but was holden to have no right of action against him for the price, when the purchase went off for defect of But there the attorney received the money merely as agent for his client, to whom alone he was responsible for it: here the attorneys insisted on withholding the deeds for their own benefit, to secure the payment of their own bill. It is a mistake to say that there is no privity between the plaintiff and defendants. The privity in the original transaction was indeed between the defendants and their client: but, when the defendants compelled the plaintiff to part with money in order to regain possession of his rights, the law created a privity between them, and implied a promise to repay what the defendants should appear to have improperly obtained.

It follows that the verdict must stand for the plaintiff, the damages being reduced to 6l. 12s. 5d., the difference between the whole sum received by the defendants and the 51. due from the plaintiff to the defendants.

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Rule accordingly (4).

(1) 52 R. R. 558 (11 Ad. & El. 983, 991).

(3) 52 R. R. 542 (11 Ad. & El. 926). (4) See Davies v. Vernon, post.

(2) 57 R. R. 817 (2 Q. B. 837).

(Trin. Vac., July 6th, 1844.)

1844. *Nov.* 10. *May* 31.

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# ELIZABETH HENDERSON v. BETHEL HENDERSON (1).

(6 Q. B. 288-299; S. C. 13 L. J. Q. B. 274; 8 Jur. 755.)

Declaration in debt charged that defendant was indebted to plaintiff in 8,8831., by virtue of a decree and sentence of the Supreme Court of Newfoundland (established by stat. 5 Geo. IV. c. 67) in a cause on the equity side of the said Court, wherein the now plaintiff and others were plaintiffs. and the now defendant was defendant, by which decree it was ordered that defendant should pay plaintiff the said sum.

- (1) Plea, that the decree was made in respect of matters of trust and executorship accounts, not cognizable in a court of law: Held bad, debt being maintainable at law on a decree of a colonial court of equity simply ascertaining a balance and ordering payment by defendant to plaintiff.
- (2) Plea, that plaintiff sued in the Supreme Court as widow of H. in right of H. without showing any right of representation to warrant such suit, and that the decree was made on matter of complaint solely in right of H.: Held bad, because whatever constituted a defence in that Court ought to have been there relied on; and because this Court would assume that right had been done there, unless something appeared to have been done repugnant to natural justice.
- (3) Pleas, showing a set-off for debts from H., or his estate, to defendant: Held bad; because the plaintiff sued in her own right in this Court, and the defence, if available at all, was one which ought to have been made in the Supreme Court.

DEBT. The declaration charged that defendant was indebted to plaintiff in 8,883l. 6s. 8d., upon and by virtue of a certain decree and sentence before them, to wit on &c., made in and by her Majesty's Supreme Court of Newfoundland, in a certain matter and cause then depending in the said Court, on the equity side of the said Court. wherein the now plaintiff and certain other persons, to wit &c. (naming three others), were plaintiffs, and the now defendant was defendant; by which said decree and sentence it was ordered and decreed that the now defendant should pay to the now plaintiff a large &c., to wit the said sum of 8,883l. 6s. 8d., sterling money of Great Britain: That (2) the said \*Supreme Court of Newfoundland, during all the time that the said matter and cause was depending therein as aforesaid, and continually until and at the time of making and giving the said decree and sentence as aforesaid, was,

- (1) Cited Ellis v. M'Henry (1871) L. R. 6 C. P. 239, 40 L. J. C. P. 109; Marbella Iron Co. v. Allen (1878) 47 L. J. C. P. 605; Pemberton v. Hughes [1899] 1 Ch. 781, 68 L. J. Ch. 281, 80 L. T. 369, C. A.—A. C.
- (2) The allegation following was inserted as an amendment, an objection having been taken that the juris-

diction did not sufficiently appear. Reference was made to note (2) to Pitt v. Knight, 1 Wms. Saund. 92 and Walker v. Witter, 1 Doug. 1; and also to Church v. The Imperial Gas Light and Coke Company, 45 R. R. 638 (6 Ad. & El. 846, 857), as to the intendment, from the style of the Court, that it was the Court created by stat. 5 Geo. IV. c. 67.

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and was duly holden, within the jurisdiction thereof, in parts Henderson beyond the seas, that is to say at Newfoundland aforesaid; and the said decree and sentence was made and given at a place within the jurisdiction of the said Court, that is to say at Newfoundland aforesaid, by the Chief Judge and other Judges of the said Supreme Court, that is to say by &c. (naming the Chief Judge and two assistant Judges): That the said sum is still wholly unpaid and unsatisfied to plaintiff, although a reasonable time from the making of the said decree, for the payment of the said sum, had elapsed long before the commencement of this suit: and which said order and decree still remains in force and effect, not in anywise reversed or set aside or otherwise vacated. Whereby an action &c. Yet defendant hath not paid &c.

Plea 4. That the said decree and sentence was made for and in respect of matters of trust and executorship accounts, and of matters not cognizable in a court of law. Verification.

6. That the said decree and sentence was founded upon a certain bill filed in the said Court; and that, by the said bill (to wit the original bill), the plaintiff sued as Elizabeth Henderson, widow of Jordan Henderson deceased, as such widow in right of the said deceased, without showing, nor did there appear to be, any right of representation either in herself or either of the other plaintiffs, or in any other person, to warrant such suit; \*and that such decree was made upon matters of complaint solely in right of the said deceased. Verification.

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- That the sum ordered and decreed by the said decree and sentence to be paid by defendant to plaintiff was for and in respect of a right claimed and asserted by and on behalf of plaintiff through and in right of her late husband J. H., deceased, and in no other right; that the said J. H., before and at the time of his death, was indebted to defendant in 10,000l. for money before then lent and advanced by defendant to J. H. at his request; and in &c. (10,000l. for money paid by defendant for J. H., 5,000l. for interest due from J. H. to defendant, 10,000l. for money had and received by J. H. to defendant's use, and 10,000l. on an account stated between J. H. and defendant); which said sums of money all remained due and unpaid to defendant at the time of the commencement of this suit, and still remain due and unpaid; and which said sums exceed the amount directed to be paid by defendant by the said decree and
- (1) The seventh plea was demurred to, and was abandoned by the defendant's counsel.

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HENDERSON sentence; and out of which sums defendant is ready and willing, HENDERSON, and hereby offers, to set off and allow the amount so directed. Verification.

- 9. That the sum ordered was for a right claimed by plaintiff in right of J. H., and in no other right (as in the eighth plea), and for and in respect of a matter and cause cognizable only in a court of equity: that, during the lifetime of J. H., he and defendant carried on business in partnership together; that such partnership continued down to the time of the death of \*J. H.; and that, at the time of the death of J. H., there was due from him to defendant, for and in respect of the several matters and accounts of the said partnership, a sum exceeding the amount directed to be paid by defendant by the said decree and sentence, to wit 10,000l.; out of which said sum the defendant is ready &c. (as before).
- 10. Allegations, as in the ninth plea, as to the right in which plaintiff claimed in the Supreme Court, and as to the partnership down to the death of J. H. That, after the death of J. H., the said business, formerly the partnership business, was carried on by defendant for his benefit and that of persons entitled, as representing J. H., to his share and interest therein; and that such business was so carried on after the death of J. H. by defendant as an accounting party, and a party liable to be called on to account for and in respect of the said business and the accounts relating thereto: that, before and at the time of the making of the said sentence and decree, there was justly due to him, upon the accounts in respect of the several matters aforesaid, a sum exceeding the sum ordered to be paid by the said sentence and decree, to wit 10,000l.; and the said sum has ever since remained, and still is, unsatisfied; out of which said sum the defendant is ready &c. (as before).

Demurrer to the above pleas, assigning causes which, so far as they are material to the decision, will sufficiently appear from the argument.

The demurrer was argued in Michaelmas Term, 1843 (1).

Sir W. W. Follett, Solicitor-General, for the plaintiff: [ 292 ]

> The fourth plea assumes that an English court of law cannot entertain an action on the decree of a colonial court of equity. But in Henley v. Soper (2) it was decided that debt was maintainable on a decree of the then Supreme Court of Judicature in

(1) November 10th. Before Lord and Wightman, JJ. Denman, Ch. J., Williams, Coleridge (2) 8 B. & C. 16.

Newfoundland, in a suit between partners. In Russell v. Smyth (1) HENDERSON it was held that assumpsit might be maintained on a decreet made by the Lords of Council and Session in Edinburgh.

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The sixth plea impeaches the propriety of the decision of the colonial Court, which cannot be done in this form.

The eighth, ninth and tenth pleas allege a set-off for a debt due from the deceased husband. But it does not appear from the record that the plaintiff sues here in any right but her own, although the husband is named.

## Barstow, contrà :

As to the fourth plea. The Supreme Court is established by a statute of the United Kingdom, 5 Geo. IV. c. 67: therefore it is not like a foreign Court, but is in the same legal condition as the Court of Chancery in Ireland. The only distinction is that the appeal does not lie to the same tribunal (2). In Carpenter v. Thornton (3) it was held that debt could not be maintained on the decree of an English court of equity. In Henley v. Soper (4) the decree was on the law side of the Supreme Court, as appears by the report of the case in Manning and Ryland's reports, where the proceedings are set out, including a fi. fa. (5).

(LORD DENMAN, Ch. J.: Sect. 16 of stat. 5 Geo. IV. c. 67, seems to give the same execution there in suits in equity as in actions at law.)

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The form of compelling appearance is the same in each case: but the clause does not show that the process of execution is the same. A dictum in Sadler v. Robins (6) is, to a certain extent, in favour of the plaintiff. There the High Court of Chancery in Jamaica had ordered money to be paid after deducting therefrom costs to be taxed; and the costs had not been taxed. Lord ELLENBOROUGH decided that assumpsit could not lie on the decree; but he said: "Had the decree been perfected, I would have given effect to it, as well as to a judgment at common law." But it appears from Henley v. Soper (7) that, at one time, a doubt prevailed whether courts of equity had the power of enforcing the decrees of colonial courts of equity: that doubt is removed, in effect, by Houlditch v.

<sup>(1) 60</sup> R. R. 904 (9 M. & W. 810).

<sup>(2)</sup> Sect. 20.

<sup>(3) 22</sup> R. R. 299 (3 B. & Ald. 52).

<sup>(4) 8</sup> B. & C. 16.

<sup>(5) 2</sup> Man. & Ry. 153, 164.

<sup>(6) 1</sup> Camp. 253.

<sup>(7) 8</sup> B. & C. pp. 19, 20.

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HENDERSON Donegal (1). If any remedy lie in the Courts of this country, it is HENDERSON. an equitable one.

> As to the sixth plea. In Houlditch v. Donegal (1) it was held that the Irish Court of Chancery, when called upon to enforce a decree of the English Court of Chancery, might inquire into its propriety.

> (LORD DENMAN, Ch. J.: The conclusiveness of the proceeding in the first Court seems to be decided by Vice-Chancellor Shadwell, in Martin v. Nicolls (2).)

> That decision was disapproved of by Lord Brougham, C. in Houlditch v. Donegal (3): and Hamilton v. Houghton (4) is an earlier authority for submitting the first proceeding to examination before acting upon it in a \*second. Now the sixth plea alleges that the plaintiff sued, in the Supreme Court, in right of her husband without showing herself entitled to represent him. A payment to her would be no protection against a claim by a rightful administrator of the husband. In 2 Williams on Executors, 1501 (3rd ed.) (5), it is laid down that, although an administrator may file a bill before he has taken out letters of administration, the bill must allege that the administrator has obtained letters; for which Humphreys v. Ingledon (6) is referred to.

> As to the eighth, ninth and tenth pleas, the defendant relies, not on a statutable set-off, but on the allowance which courts of equity have always made in the case of cross claims. If the Court takes upon itself to give effect to the decree of a court of equity, it must also allow the equitable defence.

> (LORD DENMAN, Ch. J.: That defence, if good, was available in the colonial Court.)

The defendant had there no locus standi.

(LORD DENMAN, Ch. J.: There might be an injunction now.)

The cases on equitable set-off are commented upon in the judgment of Lord Cottenham, L. C. in Rawson v. Samuel (7). It appears that such a set-off will not be allowed unless it arise on the same transaction as the claim, and be ascertained. Here the pleas do show that the cross claims occurred in the course of the partnership; and

- (1) 37 R. R. 181 (8 Bligh, N. S. 301;
- 2 Cl. & F. 470).
  - (2) 3 Sim. 458.
  - (3) 8 Bligh, N. S. at p. 342,

  - (4) 21 R. R. 65 (2 Bligh, 169).
- (5) Part V. Book 1, Ch. 2.
- (6) 1 P. Wms. 752.
- (7) 54 R. R. 259, 262 (1 Cr. & Ph.
- 161, 178).

the demurrer admits the truth of the cross claims. If the plaintiff HENDERSON can clothe herself with the representative character, then the defendant is entitled to set off a claim to which, in that character. she would be liable.

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Sir W. W. Follett, Solicitor-General, in reply:

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As to the first plea: it is not clear that a court of equity here would enforce such a decree as this. It should seem that the English court of equity would interfere only where the decree of the colonial Court ordered something to be done for which equity alone could provide, as in Houlditch v. Donegal (1). It is said that Henley v. Soper (2) was a case on the law side of the Newfoundland Court: if so, the law there differs from the law of this country: for the claim was on a partnership account.

As to the sixth plea: whatever defence there is should be a defence which is good by the law of the country where the original proceeding takes place. The principle is correctly laid down in Phillips v. Hunter (3). The proper form of investing a party with representative rights may differ in the two countries: the very distinction between representative and individual rights may be unknown to the colonial tribunal. Even if the decree could be . impeached, the plea ought to show that the defects alleged therein are fatal by the law of Newfoundland.

As to the pleas of set-off. If there be a set-off raising an equity here, the proper course would be to apply for an injunction: that was done in Martin v. Nicells (4). At any rate, it should appear that the law of Newfoundland allows the set-off here claimed. As far as this record is concerned, the plaintiff sues in her own right; and no set-off for a debt due from her husband is good as against her.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 31st), delivered the judgment of the Court:

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This was an action brought on a decree of the equity side of Supreme Court of Newfoundland, to recover the sum of 8,8831. 6s. 8d., awarded thereby to be paid by the defendant to the plaintiff.

This statement requires us to decide the general question whether

(3) 2 R. R. 353 (2 H. Bl. 402, 410).

<sup>(1) 37</sup> R. R. 181 (8 Bligh, N. S. 301;

<sup>2</sup> Cl. & F. 470).

<sup>(4) 3</sup> Sim. 458.

<sup>(2) 8</sup> B. & C. 16.

HENDERSON such action can be maintained; the objection being that a decree HENDERSON. for payment of money by a court of equity is not a dec aration that the plaintiff has any legal right to the money, but only that, upon certain views peculiar to that Court, the payment ought to be made.

> On a former occasion, this objection was strongly felt by two of our most experienced lawyers, BAYLEY and HOLROYD, JJ., who thought also that no promise to pay could be implied from a decree in invitum; Lord TENTERDEN and BEST, J. acquiesced; the case (Carpenter v. Thornton (1) ) being that of a decree, by the Vice-CHANCELLOR OF ENGLAND, for the payment of money which appeared to be made on equitable obligations only. On the other hand, Lord Ellenborough's opinion is clear, in Sadler v. Robins (2), that he ought to give the same effect to a decree of a foreign Court of Chancery as to a judgment at common law. We have also a decision in Henley v. Soper (3), where the decree of a colonial Court of Chancery in a partnership suit, which resulted in a clear balance due from the one to the other, was held to support an action of There Lord Tenterden does not appear debt for that balance.

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to be entirely satisfied with the case of Carpenter v. Thornton (1). \*BAYLEY, J. attempts to distinguish it in a manner not very · satisfactory. Holroyd, J. says that he should have felt much doubt, but for Lord Ellenborough's dictum in Sadler v. Robins (2). LITTLEDALE. J. saw no objection to giving full effect to the decree-This latter case was in some degree impugned at the Bar, because part of the reasoning of Lord Tenrenden is at variance with what has been more recently decided in the House of Lords. He thought it necessary for a court of law to act on the decree, because he believed that our Court of Chancery would decline to enforce it: but such is not the law; for the House of Lords has decided that the Irish Chancery ought to entertain a bill founded on the decree of the English Court of Chancery, for the purpose of giving effect to it in regard to Irish property: Houlditch v. Donegal (4). do not think Lord TENTERDEN'S general reasoning destroyed by the failure of that argument. The power of the Court of Chancery may exist without excluding that of other Courts capable of giving a remedy as complete and much more expeditious. The decrees of foreign courts of equity may indeed, in some instances, be enforceable nowhere but in courts of equity, because they may involve

<sup>(1) 22</sup> R. R. 299 (3 B. & Ald. 52).

<sup>(4) 37</sup> R. R. 181 (8 Bligh, N. S. 301;

<sup>(2) 1</sup> Camp. 253.

<sup>2</sup> Cl. & F. 470).

<sup>(3) 8</sup> B. & C. 16.

collateral and provisional matters to which a court of law can give no effect; but this is otherwise where the Chancery suit terminates in the simple result of ascertaining a clear balance, and an unconditional decree that an individual must pay it. The circumstances by which the Court arrives at that conclusion do not affect the right of suing in a court of law, which grows out of the legal duty to pay. An award to pay money, made under a submission to a reference, may possibly be founded exclusively \*on equitable considerations; but the parties bound to perform it owe the money. We cannot think that their previous consent to be so bound makes a stronger obligation than that of every subject of the State to perform the duties imposed on him by a court of justice, exercising lawful jurisdiction over him. A judgment for unliquidated damages in respect to an action of tort is equally in invitum, and may equally be said to form no debt till the Court has adjudged to the plaintiff his damages: but, when so adjusted, they are recoverable as a debt.

Several pleas were pleaded to show that the defendant had not had justice done him in the Court of Chancery at Newfoundland. This is never to be presumed; but the contrary principle holds, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign Court, are repugnant to natural justice: and this has been often made the subject of inquiry in our Courts. But it steers clear of an inquiry into the merits of the case upon the facts found: for whatever constituted a defence in that Court ought to have been pleaded there; an observation which disposes of all the special pleas, not only those which rely on the want of a representative title in the plaintiff though she sued in a representative right, but also the pleas of set-off. For these last, as the parties stand described on this record, are clearly unavailing: the plaintiff is suing in her own right on a decree obtained in her own right: the set-off can only be maintained on the ground of an alleged defect in the plaintiff's title in the former suit, which ought to have been made the ground of defence there. If that suit was well decided, which we must now take it to have been, these pleas are \*bad. This is by no means inconsistent with Smith v. Nicolls (1), where the Court of Common Pleas held that the plea of judgment recovered in a colonial Court, not of record, in the defendant's absence, followed by no execution, was not a bar to the plaintiff's recovering for the same cause of action in our Courts. But no opinion was intimated that the question decided by the

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colonial Court between parties properly brought before it was open to examination in an action brought on its judgment here. Circumstances may indeed exist which would render it unconscientious and inequitable to claim the sum which the Court has decreed to be paid. But the same might be true of any sum recovered by the judgment of the highest Court, or of any debt whatever. In such case the remedy is by a proper application to the Court of Chancery, which has ample means of preventing the wrong from being effected by the iniquitous enforcement of a legal right.

We do not find it necessary to weigh the opinion of this Court in Carpenter v. Thornton (1) against that in Henley v. Soper (2), or decide that an action will, under any circumstances, lie in this Court on a decree of the High Court of Chancery. That point may perhaps still be open to fuller consideration when the question is raised. But we agree with Lord Ellenborough's opinion in Sadler v. Robins (3), and observe with satisfaction that the Court of Exchequer (in Russell v. Smyth (4)) acted in conformity with our present decision, which is that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

1844. June 27.

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# KEIR v. F. LEEMAN AND PEARSON (5).

(6 Q. B. 308-322; S. C. 13 L. J. Q. B. 359; 8 Jur. 824.)

The law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

Therefore, although the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on plaintiff and riot, and of an action for wrongful levy under a fi. fa., which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the fi. fa., is altogether invalid, as grounded on an illegal consideration.

Although the compromise of the prosecution was entered into with the leave of the Judge before whom the indictment came on for trial.

Assumpsit. The declaration stated that, before the making of the promise of the detendants, George Emmitt was indebted to

- (1) 22 R. R. 299 (3 B. & Ald. 52).
- (2) 8 B. & C. 16.
- (3 1 Camp. 253.
- (4) 60 R. R. 904 (9 M. & W. 810).
- (5) Affd. in Exch. Ch. 9 Q. B. 371, 15 L. J. Q. B. 360; foll. Rawlings v. Coal Consumers' Association (1874) 43
- L. J. M. C. 112; Flower v. Sadleir (1882) 10 Q. B. D. 573; Windhill Local Board v. Vint (1890) 45 Ch. D. 351, 59 L. J. Ch. 508; Jones v. Merionethshire Building Society [1892] 1 Ch. 163, 61 L. J. Ch. 138, C. A.

plaintiff in 150l., for the recovery of which plaintiff had brought an action in the Queen's Bench, and by the judgment of the Court recovered his damages, &c., and thereupon, &c., sued out a writ of ii. fa. directed &c. (setting out the writ); which writ was duly indorsed &c., and was delivered &c.; by virtue of which writ the sheriff had made his warrant in writing, directed &c. (setting out the warrant); which warrant was delivered to one Acton to be executed &c.; and thereupon, by virtue of the warrant and writ, Acton had entered upon a farm and into a messuage and dwellinghouse of George Emmitt, situate &c., and had seized &c., and, Acton so being in possession, one William Emmitt, claiming title to the farm, messuage, dwelling-house, goods and chattels, crops and effects, as his own property, had, together with divers other persons, to wit George Emmitt and five others (naming them), assaulted Acton and his followers and assistants, and forcibly and violently ejected and expelled him \*and his followers and assistants from the messuage and dwelling-house, and from the possession of divers of the goods and chattels so seized and taken, and had kept and detained the same in the dwelling-house, and, by means of shutting the outer door, excluded Acton from the dwelling-house, and from the possession of the goods and chattels so kept and detained, until Acton, in order to retake possession by virtue of the warrant, had necessarily and unavoidably a little broken the outer door, and had thereby re-entered and retaken the goods and chattels in the dwelling-house being so kept and detained. That thereupon afterwards, and before the making of the promise &c., William Emmitt had commenced an action of trespass in Q. B. against the sheriff and Acton for the said entry into the messuage and dwellinghouse, and the said seizing &c.; and the sheriff &c. appeared and pleaded certain pleas (particularising them), which led to certain issues (describing them); and thereupon the issues had come on to be tried at the Summer Assizes for Yorkshire, A.D. 1842; and, upon the trial, William Emmitt had set up an assignment by George Emmitt of all his estates and effects to trustees, by whose transfer and conveyance to him, William Emmitt, he claimed title to the same; but it was insisted by the sheriff and Acton, at the trial, that the assignment was not bonâ fide but fraudulent and void. That, the question having been left to the jury, their verdict just before the making of the promise by the now defendants had been returned for William Emmitt on the first issue (Not guilty), and the sheriff &c. on the other issues. That, after the entry of

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Acton into the messuage and dwelling-house, and the assaulting, ejecting, expelling and excluding &c. (by the parties above stated). \*and before the making of the promise by the now defendants, a certain indictment against William Emmitt, George Emmitt, and &c. (five others, naming them), for riotously assembling to disturb the peace, and for assaulting Acton and his followers &c. on the occasion &c. (above mentioned), had been preferred by the now plaintiff by his attorney &c.; and the indictment, having been found at the Yorkshire Lent Assizes, A.D. 1842, stood for trial at the said Summer Assizes for the said county; and the prosecutor was then and there, after the trial and verdict in the said cause. and at the time of the making the promise &c., about to proceed further on such indictment, and to try the same, and adduce and offer evidence in support thereof. That, before and at the time of the making the promise by the defendants, the sheriff and his bailiff were and had been and continued in possession of the crops and effects so seized as aforesaid &c., by virtue of the warrant and execution &c.; and, subject to the said execution, and possession thereby, the said William Emmitt was and had been and continued in possession of the same; and divers costs and charges had, before and at the time of the making of the promise by the defendants, been incurred in and about the seizing and remaining in possession &c.; and a large balance of the costs and charges and of the principal money, damages and costs recovered against George Emmitt remained unsatisfied &c. That, before and at the time of the promise by the now defendants, the action by William Emmitt against the sheriff &c. had been and was defended by &c. as the attorney therein in the name of the sheriff and bailiff, but under the indemnity, and on the retainer, and at the costs and expenses, of the now plaintiff; and divers large costs \*and charges had been incurred and were due to such attorney about the defence of the last-mentioned suit. That, before and at the time of the promises by the now defendants, the said prosecution and indictment had been preferred and conducted by the said attorney on the retainer and at the costs and expenses of the now plaintiff, and divers large costs and expenses had been and were incurred and were due to the attorney in and about the said prosecution &c. for the said riot and assault, of all which several premises &c. (notice to defendants). And thereupon afterwards, to wit on &c., in consideration that the prosecutor (to wit the now plaintiff) of the indictment against George Emmitt and others (naming them)

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would, to wit at the request of the defendants, not proceed further on such indictment, and of the Sheriff of Yorkshire withdrawing, to wit by and with the consent and direction of the now plaintiff at the request of the now defendants, from the possession of the crops and effects at the farm under an execution against George Emmitt at the suit of the now plaintiff, the now defendants undertook and promised the plaintiff to pay him, on or before the last day of Michaelmas Term next thereafter, the balance of the principal money and costs then remaining unsatisfied in the original cause, to wit Keir v. George Emmitt, and the balance of costs and charges incurred in and about the execution of the warrant of fi. fa. issued in the same cause. And the now plaintiff avers that, confiding in the promise &c., the prosecutor of the indictment, to wit the now plaintiff, did not proceed further on such indictment; and that afterwards, to wit on the day and year last aforesaid, at the said Summer Assizes and Sessions of over and terminer &c., then holden for the \*county of York &c., before &c., in and for the said county, the said prosecutor of the indictment did, by and with the assent of the said Acton and his followers and assistants, instruct counsel to inform, and by such counsel did inform, the said justices so assigned &c., in open Court, at the said Assizes and Sessions, of and concerning the premises, and did then and there, by and with the assent and leave of the Court, thereupon forbear to proceed further and to offer any evidence upon the said indictment; and thereupon the said persons so indicted &c. were in due form of law by a jury of the said county acquitted of the premises in the indictment charged upon them; of which &c. (notice to defendants). And the plaintiff avers that he, confiding &c., did forthwith withdraw the said execution, to wit the writ and warrant against George Emmitt, and gave notice to the Sheriff of Yorkshire and his bailiffs to withdraw, and they immediately did withdraw, from the possession of the crops &c.; of which &c. (notice to defendants). balance of the principal money and costs so recovered &c., at the time of the making the promise by the defendants remaining unsatisfied, amounted to 841. 12s., of which &c. (notice); and that the balance of the costs and charges of the execution, unsatisfied at the time of the defendants' promise, was 63l. 11s. 11d.; of which defendants had notice, and were requested to pay the several sums &c.: yet they had disregarded their promise, and had not paid &c.; whereby the plaintiff had lost the balance of the principal money and costs recovered against George Emmitt, and had become

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The second count, after setting out the same matters as the first, and the same consideration for the promise of the defendants, alleged the promise of the defendants to be to pay the attorney the costs, as between attorney and client, of the defendants in the suit of *Emmitt* v. Wentworth and Acton (the sheriff and his bailiff), and concluded with similar averments and breach.

The third count laid the same consideration for the promise, but stated the promise to be to pay the attorney the costs as between attorney and client of the prosecution against George Emmitt and others for riot and assault, with similar averments and breach.

The defendants pleaded several pleas; the second of which, pleaded to the first count of the declaration, set out the indictment, which, in fifteen counts, charged the parties indicted with riot and assault, assault on a sheriff's officer in the execution of his duty, assaults upon persons then acting in aid of a peace officer in the due execution of his duty, with intent to resist the apprehension of the then defendants for an offence for which they were liable to be apprehended (to wit for having riotously assembled and assaulted &c.), riotous assemblies and assaults, a riot and assault with intent to prevent the apprehension of the then defendants for an offence &c., riotous assemblies, and common assaults. concluded: "and so the defendants say that the said consideration for the said supposed promise in the said first count mentioned was and is illegal, and such supposed promise was and is wholly null and void." Verification. The fourth and eighth pleas, pleaded respectively to the second and third counts, were, that the indictment in these counts respectively mentioned was similar to that set out in the first \*plea, and that therefore the consideration for the supposed promise was illegal and null and void: concluding with verifications.

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Demurrer to all the pleas. Joinder.

The points for argument stated by the plaintiff were, that the pleas contain no answer to the declaration, nor show any cause why the consideration for the promise in the respective counts is, by the common law or by statute, illegal, and the promise null and void; that neither the offence stated in the counts to have been committed, nor the indictment stated therein to have been preferred, and set out in the pleas, are of such a nature as to make

he consideration of the plaintiffs not proceeding further in the ndictment an illegal consideration for the promises, it being averred in the counts, and not denied by the pleas, that the not proceeding further in the indictment was by the assent and leave of the Court, obtained after the justices there had been informed of the premises in those counts respectively stated: that it is not averred by the pleas, nor does it appear by the counts, that it was legally or morally the duty of the plaintiff, or that he was under any obligation of recognizance, subpana or otherwise, to proceed further on the indictment, or that his testimony was required, or could be used, in any such further proceeding, or that he had any connexion with the offence, or the prosecution, except that it was conducted at his expense, and that the consideration of such a prosecution not proceeding was not an illegal consideration: that, if the consideration of the plaintiff not proceeding further in the indictment be insufficient, it is only part of the consideration averred, and that the residue, namely the withdrawing the fi. fa., \*is sufficient to support the promise laid in each of the counts; that the consideration may be divisible, and that part, if insufficient, namely the not proceeding further in the indictment, may be applied only to the promise in the last count, namely to pay the costs of that prosecution; and that the sufficient part of the consideration, namely the withdrawing the execution, may be applied to the promises in the other two counts, namely to pay the debt and costs in the action in which the execution issued, and the costs in the action arising from the levy.

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The defendants' points were, that the considerations for the promises in the declaration (as appearing upon the declaration and pleas) are illegal, and the contracts illegal and void.

The demurrer was argued, in last Term (1), by Bliss for the plaintiff, and Kelly, contrà. The course of the argument and the points decided will appear sufficiently from the judgment of the Court. The following authorities, in addition to those noticed in the judgment, were referred to: Rex v. Cotesbatch (2), Nerot v. Wallace (3), Garth v. Earnshaw (4), Erans v. Jones (5), Harvey v. Morgan (6),

- (1) May 28th. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.
  - (2) 2 Dowl. & Ry. 265.
  - (3) 3 T. R. 17.
  - (4) 3 Y. & C. 584.
  - (5) 52 R. R. 645 (5 M. & W. 77).
- (6) 2 Stark. N. P. C. 17. See also Kirwan v. Goodman, 9 Dowl. P. C. 330; Horton v. Benson, Freem. C. B. 204; Reg. v. Gore, 8 Dowl. P. C. 102; Blanchard v. Lilly, 9 East, 497; Rex v. Moute, 37 B. R. 421 (3 B. & Ad. 237); stat. 18 Eliz. c. 5.

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Harrington v. Kloprogge (1), 1 Story on Equity, s. 294 (p. 298, 3rd ed.), Chitty on Contracts, 674, 3rd ed., 4 Blackst. Comm. 363 (2).

Cur. adv. rult.

[316] LORD DENMAN, Ch. J., in this vacation (June 27th), delivered the judgment of the Court. His Lordship, after stating the substance of the declaration, proceeded as follows:

The plea set out the indictment, and averred the illegality of such an agreement. The plaintiff demurred; and the general doctrine was largely discussed before us.

The principle of law is laid down by Wilmor, Ch. J., in Collins v. Blantern (3), that a contract to withdraw a prosecution for perjury. and consent to give no evidence against the accused, is founded on an unlawful consideration and void.

On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe.

An early case occurs before Lord Talbot, Johnson v. Ogilby (4). A bill was filed to compel performance of an agreement to pay money and assign property in consideration, among other things. of dropping an indictment for a cheat of a peculiar character. A female, who had agreed to levy a fine and suffer a recovery of some houses to the use of plaintiff, afterwards pretended that she was married at the time of the agreement, and \*pleaded her marriage The plaintiff then indicted her for a cheat; and, when the indictment was ready for trial, the parties entered into this compromise. The principal question argued was whether the attorney's signature bound him personally. But the reporter says: "Then the LORD CHANCELLOR started another point, (viz.) that this was a criminal prosecution; and the agreement being to stiffe a criminal prosecution, was therefore not to be executed in equity. To which I answered," (says Mr. Williams) "that it was true, in

- (1) Note (a) to Palmer v. Bate, 23 R. R. 535 (2 Brod. & B. 678).
- (2) Bliss also argued that the pleas ought to have contained all the averments that would have been necessary in an indictment for compounding an offence, and were bad for not averring that any offence had been committed
- and that the prosecutor had been bound over to prosecute, or was a party grieved, or was a person who could have given evidence in support of the prosecution.
- (3) 2 Wils. 341, 349. See 1 Smith. L. C. 154.
  - (4) 3 P. Wms. 277.

the case of a prosecution for felony, an agreement to stifle such a prosecution was not lawful; but where the indictment was for a fraud, and the party wronged by the fraud came to an agreement to be satisfied for such injury, (as in conscience he ought to be) this was lawful, matters of fraud being cognizable and relievable as well in equity as at law: wherefore this objection was no further insisted on."

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This reason is not, perhaps, very satisfactory; nor did this point apparently receive much consideration. It occurred in 1784: Collins v. Blantern (1) in 1767.

The doctrine was several times discussed before Lord Kenyon.

In Mr. Kyd's Treatise on Awards, two of his decisions are reported. In 1795, an indictment against Lord Falkland, John King and another (2), for a conspiracy to cheat Mr. Phillips by a false representation of the ownership of certain estates on which he advanced money, and also indictments for perjury, were called on for trial at Nisi Prius: the defendants were acquitted on the first, and (it should appear) not on the merits; after \*which an order was made at Nisi Prius for referring to arbitration all the matters in difference between the prosecutor and the defendants in the said indictments. This was done with the acquiescence of Lord Kenyon. Mr. Kyd remarks on this proceeding as inconsistent with what the same Judge had done in Rex v. Coombs (3) and Rex v. Rant (3), where cross bills of indictment for riot and assault had been preferred and submitted to arbitration; in which case the counsel "had hardly stated the fact of the submission by bond, when the Court expressed a considerable degree of surprise that a criminal prosecution should be so submitted; they observed that it was usual indeed in prosecutions of this kind, before a verdict was given, or after verdict of conviction, and before sentence, for the parties to talk together by the recommendation of the Court, and if they agreed, the Court set a nominal fine; but the whole was done under the inspection of the Court, and their sentence formally followed."

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In Fallows v. Taylor (4) the magistrates had directed prosecutions for a public nuisance in a river; the plaintiff by their order had prepared bills of indictment against the defendant, who, in order to avoid the expense of the indictment, entered into the bond on which the action was brought, to remove the nuisance. Lord Kenyon, Ch. J.

<sup>(1) 2</sup> Wils. 341.

<sup>(2)</sup> Rex v. Lord Falkland, Kyd on Awards, 66, 2nd ed. Cited in Watson

on Awards, 48, note (1), 2nd ed.

<sup>(3)</sup> Kyd on Awards, 64, 2nd ed.

<sup>(4) 7</sup> T. R. 475.

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and LAWRENCE, J. clearly held this to be a lawful consideration for the bond.

In Drage v. Ibberson (1) Lord Kenyon said "that he should adhere to the class of cases which held, that the consideration being the settling of a misdemeanor, might be good in law," and nonsuited the plaintiff, who had \*brought trover for a promissory note given by himself to compromise a charge. The facts of the case are not very intelligible; but the caution with which that learned Judge expressed himself is worthy of observation.

In Pool v. Bousfield (2) (1807) an agreement had been between the plaintiff and defendant to discharge the latter from liability on a bill of exchange, as an inducement not to move the Court for the defendant to answer the matters of an affidavit. Lord Ellenborough held that the agreement was corrupt and invalid, and the plaintiff was entitled to recover that amount.

The case of Edgcombe v. Rodd (3) (1804) was very singular in its circumstances. The plaintiff had been charged before justices with a misdemeanor, that of disturbing the religious worship of a dissenting congregation. He sued them for false imprisonment: and they pleaded by way of defence that they had discharged him from the imprisonment, and that the prosecutor had agreed to proceed no farther, in satisfaction of that same imprisonment. On argument this defence was properly held naught; and each of the Judges declares his opinion that the agreement itself was unlawful, as an obstruction to public justice. Le Blanc, J. observes: this "was a prosecution for a public misdemeanor, and not for any private injury to the prosecutor."

Becley v. Wingfield (4) was an action on a promissory note for 24l. given by a defendant to a parish officer, on whose prosecution he had been convicted at Quarter Sessions of beating his apprentice. The plaintiff had been bound over to prosecute; and the Court considered this security in abatement of the period of defendant's \*imprisonment for the misdemeanor. The judgment of Lord Ellenborough, Ch. J. is as follows: "There does not seem to be any objection to the security which has been taken, either as contrary to the provisions of the statute, or to the general principle of law. The overseers got no pecuniary benefit to themselves or to the parish by taking this security, beyond the fair amount of the expenses incurred by them in bringing the defendant to justice.

<sup>(1) 2</sup> Esp. 643,

<sup>(2) 10</sup> R. R. 633 (1 Camp. 55).

<sup>(3) 7</sup> R. R. 700 (5 East, 294).

<sup>(4) 10</sup> R. R. 431 (11 East, 46).

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It did not stifle a public prosecution, or elude the public interest in bringing such an offender to justice, by way of example to others. The security in question, given with the sanction of the Court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. If we had seen any ground for suspecting that the authority of the Court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears."

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I happened to be both at Quarter Sessions when this note was given, and at the Assizes where the case was tried; and I always felt some doubt whether the proceedings thereby sanctioned was quite correct: the principle, however, on which compromise of offences may be lawful is forcibly laid down with proper limitations. Kirk v. Strickwood (1) is to the same effect.

In Baker v. Townsend (2) the Court of Common Pleas held that, after conviction on an indictment for assault committed in relation to claim of right to land, where the defendant was brought up for judgment, the assaults, the costs of the indictment, and the disputed \*right of possession, and all matters in dispute, might lawfully be referred to arbitration. Gibbs, Ch. J. thus expressed himself: "The parties have referred nothing but what they had a right to refer. They have referred the several assaults: these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred."

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The last case to be cited is Elworthy v. Bird (3). Sir J. Leach there enforced an agreement for a separation of man and wife under the circumstances, though it embraced also a compromise of indictment for assault. The doctrine was fully discussed: and the Vice-Chancellor concisely remarks that "all the authorities concur that the policy of the law does permit the compromise of indictments for assault, and such compromises are frequently recommended and approved by the Court."

The result of the cases makes it clear that some indictments for misdemeanor may be compromised, and equally so that some cannot. The line will, as we apprehend, be found correctly traced by Gibbs, Ch. J. in the passage just quoted, and by Le Blanc, J. in Edgcombe v. Rodd (4).

<sup>(1) 4</sup> B. & Ad. 421.

<sup>(3) 2</sup> Sim. & St. 372.

<sup>(2) 18</sup> R. R. 521 (7 Taunt. 422).

<sup>(4) 7</sup> R. R. 700 (5 East, 294).

Keir • v. Leeman. We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.

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In the present instance, the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise.

The approbation of the Judge (whether necessary or not) may properly be asked on all occasions where an indictment is compromised on the trial; plainly it cannot make that legal which the law condemns. But, according to this record, the obtaining it was not made a condition of the promise, nor was it in fact obtained till after the agreement made.

So much was said in argument for the purpose of raising a doubt whether the plaintiff was prosecutor of the indictment, and had bound himself to any thing inconsistent with his public duty in withdrawing the prosecution, and forbearing to adduce evidence in support of the indictment, that we ought not to pass it over entirely. The language of the declaration and of the plea, however, requires only to be read, to show that there is no real doubt on the point.

We think the agreement invalid as founded on an illegal consideration, and that the defendants are entitled to judgment.

Judgment for defendants (1).

# IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

1844. June 24. JENNEY AND RUNNACLES v. BROOK.

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(6 Q. B. 323-342; S. C. 13 L. J. Q. B. 376; 8 Jur. 781.)

Plaintiff below demised land by indenture, excepting all timber, timber trees, and other trees, &c., bushes and thorns, other than such bushes and thorns as should be necessary for the repair of the fences; the lesse covenanted to keep the fences in repair during the term, finding all materials, except that the lessor should find rough wood for such repairs, if

growing upon the premises; and the lessor covenanted during the term to provide the lessee sufficient rough timber, stakes and bushes, if growing on the premises, for doing such repairs.

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Held, dubitante Pollock, C. B., that the provision as to bushes and thorns necessary for repairs was not an exception out of the exception, but that all trees, bushes, and thorns were excepted out of the demise, whether part of the fences or not, or whether necessary for repairs or not; and that, on the trial of an action against wrongdoers for cutting some of the bushes and thorns, a direction by the Judge, that, if they were cut by the defendants, the plaintiff was entitled to a verdict, was right, without previously putting any question to the jury whether the bushes &c. were part of the fence, or were necessary for repairs.

Semble, that, before the lessee could take any of the thorns &c. for repairs, they must have been assigned for that purpose by the lessor.

The Highway Act, 5 & 6 Will. IV. c. 50, s. 65, enacts that, if the surveyor shall think that any carriage way is prejudiced by the shade of any hedges, or by any trees, except trees planted for ornament &c., and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriage way by any hedge or tree, the owner of the land on which the hedge &c. grows, next adjoining to such carriage way, on the surveyor's information, may be summoned before a Special Session, to show cause why the hedges are not cut, pruned or plashed, or such trees not pruned or lopped, in such manner that the carriage way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way to the damage thereof, or why the obstruction caused in such carriage way should not be removed; and, if the justices shall order that such hedges shall be cut, pruned or plashed, or such trees pruned &c., in manner aforesaid, or such obstruction removed, the owner shall comply within ten days after the service of the order, and in default thereof shall be subject to a penalty; and the surveyor, if the order be not complied with, is authorised and required to cut, prune, or plash such hedges, and to prune &c. such trees, for the benefit of the highway, and to remove such obstruction, to the best of his judgment, and according to the true intent of the Act. By sect. 105, any person thinking himself aggrieved may appeal to the Quarter Sessions, first giving notice of appeal within fourteen days after cause of complaint.

At a Special Session for the highways, an order was made, reciting a complaint by the surveyor, that the owner had neglected to cut, prune or plash certain hedges and trees upon his farm, on the right hand side of a certain carriage way, situate &c., whereby the sun and wind were excluded from the said carriage way, to the damage thereof, and whereby also obstructions were caused in the same carriage way, contrary to the statute &c.; and that the owner had appeared and the said offence was proved; and the justices did thereby order the owner to cause the said hedges to be cut &c., and the said trees pruned &c., and the said obstructions complained of, to the injury or damage of the said highway, removed, within ten days from service of the order. The owner cut away some part of the hedge; but the surveyor, considering the order not properly complied with, himself cut the hedge after the lapse of ten days, the owner not having in the mean Trespass being brought, the Judge, at the trial, directed the jury that, although the plaintiff had not appealed, the surveyor was not justified unless the order was valid: Held, that the direction was right.

The Judge, at the trial, also directed the jury that the order was bad.

Held, that the statement that the trees were on plaintiff's farm, and on the side of the road, was equivalent to a statement that he was the owner JENNEY r. Brook.

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of the land next adjoining the road, so that the order was not bad altogether for omitting to show that fact.

Held also, that, the exclusion of sun and wind being one of the injuries complained of, the order was bad in part, as not stating the extent to which the cutting &c. should take place with reference to that injury: Semble, that a direction to cut &c., so as to prevent the sun and wind from being excluded, would have been sufficient, without any more precise orders as to the extent of the cutting.

Held also, that the order was bad as to trees, for not showing that they were not planted for ornament &c.

But held also, that it sufficiently appeared by the order that there was a complaint of actual obstruction to the highway by hedges and trees which required cutting &c., and a direction to remove that obstruction: wherefore, as the surveyors had lawful authority for part of the trespasses for which the damages were given, a venire de novo must be awarded.

TRESPASS for breaking and entering plaintiff's close, and cutting down and destroying his hedges, and cutting down, prostrating and destroying the trees, bushes, shrubs and thorns of plaintiff.

Plea: Not guilty, by statute (5 & 6 Will. IV. c. 50 (1), s. 1091.

Issue thereon.

(1) Sect. 65 enacts, "that if the surveyor shall think that any carriage way or cart way is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament or for shelter to any hop ground, house, building, or court yard of the owner thereof,) growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriage way or cart way by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are growing next adjoining to such carriage way or cart way to appear before the justices at a Special Sessions for the highways to show cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriage way or cart way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way or cart way to the damage thereof, or why the obstruction caused in such carriage way or cart way

should not be removed: and the question as to the cutting, pruning. plashing such hedges, or the pruning and lopping such trees, or the removal of such obstruction, as aforesaid, shall, upon proof of the service of such summons, and whether the said owner attend or not, be determined at the discretion of such lastmentioned justices; and if such justices shall order and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed. the said owner shall comply therewith within ten days after a copy of such order shall have been left" &c., "and in default thereof shall forfeit, on conviction, a sum not exceeding 40s.; and the said surveyor, if the order of the said justices is not complied with. shall and he is hereby authorised and required to cut, prune, or plash such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this Act;" the surveyor to be reimbursed by the owner for the expenses, over

This cause was first tried before Patteson, J. at the Suffolk Summer Assizes, 1840, and a verdict found for the defendants; which was afterwards set aside by the \*Court of Q.B.; and a new trial was ordered (1). The cause was tried a second time, at the Suffolk Spring Assizes, 1842, before Atcherley, Serjt.: and the defendants below tendered a bill of exceptions to the learned Judge's summing up. The jury found for the plaintiff below. Judgment being signed, a writ of error was brought in the Exchequer Chamber.

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The bill of exceptions stated that on the trial the plaintiff below gave evidence that he, by indenture dated 15th September, 1836. demised to one Butcher, for eight years to commence from 11th October then next, a farm comprising the locus in quo, except certain plantations, and "also all and all manner of timber, timber trees, and other trees, stands, pollards, bodies of trees, saplings, spires, sallows, willows, wood, underwood, topwood, \*bushes, and thorns. other than such bushes and thorns as shall be necessary for the repairs of the fences," with liberty for him (the lessor), with servants &c., from time to time &c., during the demise, to enter upon the said premises, to lop, top, fell &c., and carry away the same, or any of them, and to view and see the state and condition of the said premises, and to repair &c. Covenants (amongst others) by the lessee, "that the said lessee shall not cut up, stub up, carry, lop, top, fell or injure, nor suffer to be so used, any of the timber trees, pollard trees or wood, now " &c. "or at any time during this demise standing, growing or being upon the said demised premises. but shall and will use his and their utmost endeavours to preserve the young and other trees, and the fences, under the penalty "&c. (certain pecuniary penalties were then named for every timber tree, pollard, &c., used contrary to this covenant); "and also shall and will yearly" &c., "during" &c., "cut, cleanse and scour one seventh part of the fences and ditches "&c., "laying earth" &c., "and planting such trees carefully therein as the said Abraham Brook, his heirs or assigns may furnish, and direct to be so planted "

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and above the forfeiture; with a power of distress for the expenses and penalties.

Sect. 105 enacts that, if any person shall think himself aggrieved by any order &c., there referred to (the enactment including orders under sect. 65), such person may appeal to the next General or Quarter Sessions, first

giving to the surveyor or to the justice &c. by whose act the party is aggrieved, notice of appeal, with a statement of the grounds, within fourteen days after cause of complaint shall have arisen, and entering into recognizance &c.

(1) Brook v. Jenney, 2 Q. B. 265.

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&c.; "and during the continuance" &c. "keep, and on the expiration or sooner determination" &c. "leave, all buildings" &c. "and fences in a good" &c. "repair, finding all materials except as hereinafter mentioned, the said Abraham Brook, his heirs or assigns, finding rough wood for making such repairs, if growing upon the premises." Covenant on the part of the lessor that he and his heirs should at all times during &c. "find and provide the said Robert Butcher, if growing on the premises, sufficient rough timber, stakes and bushes for doing such repairs as are hereinbefore \*covenanted to be done by him the said Robert Butcher, his executors or administrators."

The plaintiff gave evidence that the farm demised was separated from the highway after mentioned by a fence formed by a bank and white thorn hedge growing on the top thereof and part of the demised farm, and that there were growing on the same bank, but springing from a lower part thereof, sixteen thorn trees of upwards of fifty years growth, which before the committing &c. had never been cut down, or buckheaded, although the other thorns and bushes in the fence had been frequently cut down within a few feet of the ground; and that the defendants cut down the whole of the said hedge, and the bushes and thorns there, and particularly the said thorn trees, within a few inches of the bank: and that, before the defendants so cut the same, and after the making of the order hereinafter mentioned, the plaintiff caused the said fence and hedge to be cut, pruned and plashed, according to the judgment of a witness called by the plaintiff, so as to comply with the said order. And the defendants among other things gave evidence that what the plaintiff's witnesses called thorn trees were not thorn trees, but thorns; and that, the defendants being surveyors of the highways for the said parish, a certain public carriage way in the said parish, adjoining the said farm, was prejudiced by the shade of the said hedge between the said farm and the said highway, and that the sun and wind were by the said hedge excluded from the said highway to the damage thereof, and that an obstruction was caused to the said highway by the said hedge: whereupon the defendants applied to one George Thomas, a justice of the peace in and for the said county, who thereupon on this application issued \*a summons to the plaintiff; the material parts of which sufficiently appear from

The hedge in question is one of the hedges mentioned in the said summons. The plaintiff below appeared; and the case was heard

the recitals thereof in the order hereinafter set forth.

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at a Special Session for the highways, on 27th November, 1839; when the following order was made.

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"Suffolk to wit. Whereas, on " &c., "information and complaint was made on oath unto me, George Thomas, Esq., one of her Majesty's justices of the peace " &c., "and resworn on " &c. " before me George Thomas, and Robert Newton Shawe, Esq., one of her Majesty's justices of the peace" &c., "by Edmund Jenney, of Hasketon" &c., "Esq., and one of the surveyors of the highways of the said parish, that Abraham Brook, of "&c., "being the owner of a certain farm, hereditaments and premises, situate in the said parish of Hasketon, in the occupation of "&c., "hath refused or neglected to cut, prune or plash the hedges, and to prune or top the trees, hereinafter mentioned, upon his said farm at Hasketon aforesaid, (that is to say) the several trees on the right hand side of the carriage way or cart way, situate in the parish of Hasketon, leading" &c. (other trees were mentioned), "and also the trees and hedges on the same side of the said carriage way or cart way growing or standing in a fence adjoining a certain field, called " &c. (other trees and hedges were then mentioned); "whereby the sun and wind were excluded from the said carriage way or cart way, to the damage thereof, and whereby also obstructions were caused in the same carriage way or cart way, contrary to the statute in that case" &c.: "and \*whereas, the said Abraham Brook having appeared before us the said justices at a Special Sessions for the highways held at "&c., "on "&c., "in pursuance of a summons duly served upon him to answer the said charge, and the said offence having been fully proved before us upon the oath of George Runnacles, also one of the surveyors of the said highways, we the said justices do hereby order the said Abraham Brook to cause the said hedges to be cut, pruned or plashed, and the said trees to be pruned or lopped, and the said obstruction complained of, to the injury or damage of the said highway, removed, within ten days from the service hereof; and we do also hereby order" costs to be paid by Brook to Jenney. "Given" &c. (27th November, 1839).

The plaintiff below was served with a copy of the order on the day following the date thereof. And the defendants below also gave evidence that the plaintiff afterwards, although more than ten days had elapsed from the day of the service of the said order, had

not caused the said hedge to be cut, pruned or plashed so that the sun and wind should not be excluded from the said way to the [ \*329 ]

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damage thereof, or the said obstruction removed. Whereupon the defendants, being surveyors as aforesaid, on &c., proceeded to cut, prune and plash the said hedge for the benefit and improvement of the said highway, and to remove such obstruction as aforesaid to the best of their skill and judgment, and in so doing cut down the said thorn trees or thorns; for which cutting, pruning or plashing this action was brought. And thereupon the counsel for the defendants insisted that the plaintiff could not maintain the action by reason of the lease to Robert Butcher, and that the \*trees. bushes and thorns in the declaration mentioned were not the trees, bushes and thorns of the plaintiff, and were not excepted from the said demise: but the counsel for the plaintiff insisted that the said thorn trees, or thorns, and the bushes and thorns forming the said fence, were excepted out of the said demise, and were the thorns, thorn trees and bushes of the plaintiff, and that the plaintiff could maintain his said action notwithstanding his said lease. And the said justice then and there held, and affirmed, that the plaintiff could maintain the action notwithstanding the said demise. and that the said trees, bushes and thorns were excepted from the said demise, and were the trees, bushes and thorns of the plaintiff. And the counsel for the defendants further insisted that the order hereinbefore mentioned was a good order in point of law: but the said justice then held, and affirmed, and directed the jury, that the said order was bad on the face of it. And the counsel for the defendants further insisted that, the said order, even if bad in law, yet being a subsisting order, the defendants were justified in committing the trespasses aforesaid; but the said justice held and affirmed, and directed the jury, that, if the said order were bad in law, the defendants could not justify the said trespass under it; and the said justice further directed the jury that, if the said trees, bushes and thorns were in fact cut, pruned and plashed by the defendants, the jury should find a verdict for the plaintiff. Whereupon the counsel for the defendants, conceiving that the jury, being directed as aforesaid, were misdirected as to the legal effect of the said lease and the said order, made their exceptions, &c.

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The case was argued in Easter vacation, May 9th, 1844, before Tindal, Ch. J., Pollock, C. B., Parke, Alderson (1) and Rolfe, Barons, and Cresswell, J.

<sup>(1)</sup> In the course of the argument the Central Criminal Court; but the Alderson, B. left the Court to go to argument proceeded by consent.

Martin, for the plaintiffs in error (the defendants below):

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First, as to the exception in the lease. There is an exception out of the exception, so that the thorns and bushes necessary for repairing fences passed to the lessee under the demise, which is an ordinary demise, and but for the exception would pass thorns and bushes to the lessee; and the effect of the provision as to repairs is that, so far as any of the excepted matters shall be necessary for repairs, the lease shall operate in the ordinary way; therefore, the law of bote, Co. Litt. 41 b, does not apply to the present case, which rests entirely on the contract between the parties: and, the fences, and the thorns and bushes which formed the fences or should be necessary for the repairs, passing to the lessee (who by the terms of the lease is bound to repair, so that some thorns &c. must have passed to him), it ought to have been left to the jury to find whether the thorns &c. that were cut formed part of the fences, or were necessary to the repairs.

Secondly, as to the validity of the order. The general Highway Act, 5 & 6 Will. IV. c. 50, s. 65, is framed so as to meet two different modes in which a highway may be prejudiced by trees on the road side; one by the exclusion of the sun and wind, the other by actual obstruction. The order, after stating a complaint that the trees and hedges in question both excluded the sun and wind, and obstructed the carriage way, finds that \*the "said offence" was fully proved. It is established by Rex v. The Undertakers of the Aire and Calder Navigation (1), and numerous authorities collected in Burn's Justice by D'Oyley and Williams, Vol. I., p. 693, note (a), that this Court will intend an order of justices to be right if the contrary does not appear. It is no forced interpretation here to say that the word "obstruction" is a general term including obstruction of the sun and wind as well as of the road : and the word "offence" manifestly includes both the damage and the actual obstruction. At all events the order is good as to the latter. This point did not arise in the Queen's Bench, where the plaintiff below was entitled to have a new trial if the order was bad as to any part; here the judgment must be reversed if the order is good as to any part; for the part which is good might justify some of the trespasses, and so reduce the damages, even if it did not justify the whole.

Thirdly, assuming the order to be defective, are the defendants trespassers? Their duty to protect the highways from damage and obstruction exists independently of the order.

(1) 1 R. R. 579 (2 T. R. 660).

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(CRESSWELL, J.: But does their duty to do such things as are directed by this order arise before the owner neglects to obey it?)

In some respects not; but, though the thing to be done is the same thing, whether it be done by the owner or the surveyors, as the thing which is ordered, the surveyors do it by virtue of their general duty and not under the order, to which they are not privy, and the contents of which the statute does not give them any means of learning. The plaintiff, on the contrary, was served with the order, and might \*have appealed against it under sect. 105: it would be unreasonable to hold that, after neglecting to do so, he can treat the surveyors as trespassers for doing the thing ordered: as between these parties it must be held, as was done in Hall v. Biggs (1), that the order, being a judicial act, is not absolutely void, but voidable, and continues an order till avoided. This point was not discussed in the Queen's Bench. And, even as to the question which was decided there, the nature of things shows that the order must be general in its terms: it could not possibly enumerate the twigs to be cut: the obvious meaning is that the cutting, pruning and plashing shall be to such an extent as shall remove the obstruc-The damage and obstruction to the highway may have amounted to a nuisance at common law, which the defendant might have abated independently of the statute.

### Kelly, contrà :

First, as to the exception in the lease. The point now made was not raised at the trial, and is not the point intended to be raised in the bill of exceptions. At the trial it was urged as a ground of nonsuit; and the Judge was not asked to put any question to the jury as to the thorns or bushes being necessary for repairs.

(CRESSWELL, J.: When a point is urged as affording an answer to the action, the Judge may hold either that it does or that it does not, or that it depends upon the finding of the jury. Is not it enough in a bill of exceptions to say that the direction is wrong, without going on to state what would have been correct in law?

PARKE, B.: The point seems very clearly expressed. The [\*884] \*learned Judge construed the exceptions to comprise all, subject to a liberty in the tenant to take bote. The question is whether that was right.

(1) 2 Salk. 674.

Pollock, C. B.: The exception in the lease may be so construed as to comprise all the bushes that bodily formed part of the fence; but that would be unreasonable, for the lessor might then cut down the fences all over the farm.)

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The distinction between the thorn bushes and the thorn trees was not adverted to at the trial, where the attention of all parties was turned exclusively to the sixteen trees.

(TINDAL, Ch. J.: The covenant to provide, if growing on the premises, bushes for repairs shows that the bushes remained in the lessor: the common form is to except firebote, which is a mere liberty.

CRESSWELL, J.: There might be fifty acres of bushes, and one acre only necessary for repairs: which acre is excepted?)

That question shows the substantial intention to be to except bushes of all descriptions, though bodily forming part of the fence. Were it otherwise, to whom would they belong when nothing was wanted for repairs? It is clear that some are excepted from the demise; primâ facie, all are excepted; and no evidence was given of any being necessary for repairs.

Secondly, as to the validity of the order. It is "a general principle of law, wherever a power is given to particular persons to do any written act in any particular manner, or under certain particular circumstances, whether it be to parish officers or magistrates, to grant certificates under which, if duly executed, other persons, especially public officers, are bound to act, or to grant warrants, or make orders, that their authority must appear upon the instrument itself. It must thereby appear that they are the persons authorised, and that \*the certificate, warrant, or order, was made in the manner and under the circumstances required. Otherwise" it "is not obligatory, but void: " Rex v. Austrey (1); and any multiplication of the links of the chain makes no difference: if the original order on which proceedings are founded is defective in this respect, those subsequent proceedings are void, though themselves perfect in point of form: Reg. v. Martin (2). It is said indeed that the surveyors did not act on the order now under consideration, that it is not addressed to them, and that they were no parties to it: but sect. 65 shows that they originate the proceeding, and

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<sup>(1) 6</sup> M. & S. 319, 324.

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that the summons issues on their application; and, whether it be addressed to them or not, the only case in which they are authorised themselves to cut, prune or plash the hedges is, "if the order of the said justices is not complied with:" that must mean a binding order, satisfying in itself the several matters mentioned in the earlier part of the section, not any order, perhaps by a wrong magistrate or on a wrong person, that the surveyor may think proper to obey. The order is bad, at all events, in part. enactment authorises the justices to make an order that the hedges shall be cut, pruned or plashed "in manner aforesaid," i.e. "in such manner that the carriage way or cart way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way or cart way to the damage thereof." But this order is "to cause the said hedges to be cut, pruned or plashed, and the said trees to be pruned or lopped," which is not authorised by the Act; and the words which follow, "and the said \*obstruction complained of, to the injury or damage of the said highway, removed," are unintelligible; the order does not charge an obstruction to the highway by a hedge or tree: it seems rather to refer to some obstruction of the sun and wind to the damage of the highway: nor do the words in the recital, "whereby also obstructions were caused in the same carriage way," amount to a charge of an obstruction of the highway; that would not be sufficient in an indictment for an obstruction. Stat. 5 & 6 Will. IV. c. 50, s. 65, creates two offences, injury by shading, and actual obstruction.

(CRESSWELL, J.: Both may happen from the same omission.)

They are to be remedied in different manners.

(PARKE, B.: Both might be remedied by lopping.)

The statute contemplates different proceedings in the two cases: where the offence is the exclusion of the sun and wind, the summons is to show cause why "the said hedges are not cut," &c.; where the offence is actual obstruction, the summons is to show cause why the obstruction "should not be removed:" it would, therefore, be improper to mix the two proceedings together, even if there were a distinct allegation of obstruction by a hedge or tree, which there is not. If this order is to be construed as a conviction for not pruning and plashing, the mandatory part is

defective for not adding "in such manner that the carriage way" &c. "shall not be prejudiced" &c.; if the order operates as a conviction for actual obstruction, the answer is that omitting to cut and prune &c., whereby an obstruction is caused in the highway, is not an offence within the Act.

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(Pollock, C. B.: Might not the omission to lop cause such an obstruction?)

That might be so as matter of evidence; but then the charge ought to be, \*in the words of the Act, of an obstruction caused by a hedge or tree. Instead of that the two charges are mixed together: the order is bad as to the first for the reasons already mentioned; and the second alleges only some obstruction consequential on the offence first charged.

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There is another objection which goes to the whole order: the party is not shown to be the owner of land on which such trees and hedges are growing "next adjoining to such carriage way," within sect. 65: they are alleged only to be growing "on the right hand side of the carriage way:" but a house may be on the right bank of the Thames, and yet not adjoin to the river. Here, if a narrow slip intervenes, the case is one to which the statute does not apply; there is nothing from which any intendment can be drawn.

# Martin, in reply:

The effect of the lease may be to put detached thorns and bushes on the same footing as trees, which the lessor is expressly empowered to enter and cut at all times during the demise; but, as regards the fences, the tenant distinctly covenants to cut one seventh part of them every year. Besides this, he covenants to keep the fences in repair during the term, and to leave them in repair at the end of the term; how could he do that, if the fences did not pass to him so that he might cut them when necessary? It does sufficiently appear, on a fair construction of the order, that the land is next adjoining to the highway.

Cur. adv. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT:

After stating the pleadings and the evidence \*as set forth in the bill of exceptions, his Lordship proceeded as follows:

The counsel for the defendants on the trial insisted, first, that the plaintiff could not maintain the action, because the thorns and [ \*338 ]

JENNEY r. Brook. bushes cut by the defendants were not excepted from the demise, and consequently belonged to the tenant. My brother ATCHERLEY held that they were excepted, and directed the jury that, if the trees, thorns and bushes were cut, pruned and plashed by the defendants, a verdict should be found for the plaintiff. The counsel for the defendants excepted to this direction: and the first question for us to decide is, whether the exception is well founded.

It was argued before us that the direction was wrong, and that a question of fact should previously have been submitted to the jury, viz., whether the bushes and thorns so cut were a part of the hedge or fence or not, or were necessary for repair of fences; for that, if they were either, they were not excepted from the demise. answered, and, we think, rightly, that such a question was immaterial, for that trees and bushes were excepted whether part of the fences or not, or whether they might be necessary for repair or not. The exception is of all manner of trees, pollards, saplings, spires, wood &c., bushes and thorns other than such bushes and thorns as should be necessary for the repair of fences; and these last words, we think, are to be construed not to except out of the exception any certain definite bushes and thorns. What are to be excepted depends upon the contingency of their being found necessary at some future time for repairs; and it seems to us that the true meaning of this clause is to preserve to the tenant the right of taking all or parts of such \*thorns and bushes for repairs, when required, for which probably the assignment of the landlord would be necessary, according to his covenant. We, therefore, think, though the Lord Chief Baron feels some degree of doubt upon this point, that all trees and all bushes, whether forming part of the fences or not, or necessary for repairs or not, are excepted from the demise; and, as timber trees, though in hedgerows, and though the body of the tree might form a part of the fence, would not pass to the tenant, but might be cut down by the landlerd, leaving the tenant under the obligation to repair the gap thereby made in the fences, so, in like manner, bushes and thorns might be cut down and removed. The first exception therefore to my brother AtcherLey's direction cannot prevail.

The second objection taken on the trial was to the validity of the order of the justices. My brother ATCHERLEY ruled that the order was altogether bad, on the face of it. The defendants then insisted that, if it were so, still the defendants were justified in acting as

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they did, there being a subsisting order unappealed from, and disobeyed. The learned Judge held that the defendants were not justified unless the order was valid.

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In the propriety of this latter ruling we all concur, being of opinion that the surveyors cannot act unless there has been a previous default of the party in obeying a valid order. It is no answer to say that the party might have appealed from it, and that, if he did not, third persons might act as if he had acquiesced: so to hold, would be to deprive the party of part of the time for appeal allowed by the statute, viz. fourteen days; \*the surveyors being authorised to act at the expiration of ten.

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The only remaining question is, whether the direction of the learned Judge that the order was invalid altogether can be supported? We think it cannot; and that it is bad in part only. When this case was before the Court of Queen's Bench, after the first trial (1), that Court directed a new trial, my brother PATTESON having been of opinion, on the trial, that the order was good and a protection to the surveyors as to all they did, but the Court, and my brother Patteson also, on further consideration, thinking that the order was bad; and the principal, if not the sole, ground assigned was that the direction in the order to cut and plash was general, without any description of the extent to which it was to take place, so that any cutting, pruning, or plashing would have been a compliance with the order. This was all that was necessary to be decided on a motion for a new trial. But we are now called upon to decide whether the order was altogether invalid; for, if it was invalid in part only, and the remainder was a justification for any of the acts done, the direction of my brother ATCHERLEY was wrong.

On the argument before us it was contended that the construction of the order by the Court of Queen's Bench was wrong, and that it was plain that the justices intended that the cutting, pruning and plashing should be made to such an extent as to remove the obstruction of the access of sun and air to the road, as well as the obstruction in the highway itself, by the hedges and trees adjoining. We cannot, however, concur in this \*mode of reading the order. We agree that a reasonable construction must be put upon the whole instrument, without making any intendment for or against it; but it appears to us by the context, which contains a recital of the summons, that the exclusion of the sun and wind by the trees and hedges, and the obstruction of the road, are treated as different

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JENNEY c. Brook. things (as indeed the enactment of stat. 5 & 6 Will. IV. c. 50, s. 65, clearly means that they should be), and, consequently, there is no direction in the order as to the extent to which the cutting and pruning is to take place, with reference to the injury to the high road by the exclusion of the sun and wind. If the order had followed the summons in this respect, and had directed the plaintiff to cut, prune and plash the hedges, and prune and lop the trees, so as to prevent the sun and wind from being excluded, it might have been sufficient without any precise orders as to the number of feet or inches that were to be cut. We therefore agree with the Court of Queen's Bench in the view which they took of this part of the order.

But it is said that the remainder of the order is good, and is sufficient to justify the defendants in removing any actual obstruction to the highway by the hedges or trees, or at least such as were caused by the projecting branches of the trees or hedges, and which might be removed by cutting, plashing, lopping or pruning, though it would not justify such further cutting as was necessary to prevent the hedges or trees from damaging the road by excluding the access of sun and wind. And we are of opinion that the order in this respect is good, and that, reading the summons and order together, it sufficiently appears that there is a complaint by the \*surveyor of obstruction to the road by hedges and trees which required cutting, plashing, pruning and lopping, and a direction to remove that obstruction.

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So far however as it relates to the trees the order is defective. as there is no statement that they were not planted for ornament, or shelter of a hop ground &c., which trees are excepted in the sixty-fifth section. It is good, however, in respect of the hedges.

It was however objected to the order, that it was altogether bad, for the want of a statement that the plaintiff was the owner of the land next adjoining to the road. But we think that the statement that the trees were growing on the plaintiff's fence, and on the side of the road, is equivalent. They could not be growing on the road side, unless they were close to it, according to the strictest construction of the language.

We are therefore of opinion that the order, though informal, is good in part, and gave authority to the defendants to cut, prune and plash the hedges so as to remove the actual obstruction to the carriage way, occasioned by the branches of the thorns, bushes and shrubs forming part thereof, but no further. Therefore there

must be a venire de novo; and, on the new trial, the jury will have to enquire whether the defendants did more than this, and to assess the damages incurred by the plaintiff if they did. JENNEY C. Brook.

Venire de novo awarded.

# REG. v. THE INHABITANTS OF MERIONETHSHIRE. (6 Q. B. 343-348; S. C. 13 L. J. M. C. 158; 8 Jur. 778; 1 New Sess. Cas. 316.)

1844.

June 26.

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Stat. 13 Geo. III. c. 78, s. 64, empowered the Court trying an indictment for non-repair of a highway to award costs if the defence was frivolous. Stat. 43 Geo. III. c. 59, s. 1, enacts that all "matters, and things, in the said Act contained, relating to highways," shall, so far as applicable, be extended and applied to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted."

Held, that the clause as to costs in stat. 13 Geo. III. c. 78, was substantively re-enacted in stat. 43 Geo. III. c. 59, with reference to county bridges, and therefore was not repealed when stat. 5 & 6 Will. IV. c. 50, repealed, in general terms, stat. 13 Geo. III. c. 78.

The Judge who tries an indictment for non-repair of a bridge, removed by *certiorari*, may certify after the Assizes that the defence was frivolous, and by such certificate award payment of costs to the prosecutor, which will be enforced by the Court in banc.

An indictment against the defendants for non-repair of a county bridge was removed into this Court by *certiorari*, and tried, before Gurney, B., at the last Summer Assizes for Merionethshire; when a verdict of Guilty was returned.

In last Michaelmas vacation the learned Baron, after hearing the parties on summons, made the following certificate and order: "I certify that the defence to this indictment was frivolous, and order that the defendants pay costs to the prosecutors. J. Gurney." The prosecutors then obtained a side-bar rule for taxation of their costs, judgment having previously been signed on the postea. In last Hilary Term, a rule nisi was obtained for setting aside the certificate and rule for taxation.

# Welsby now showed cause:

Although stat. 5 & 6 Will. IV. c. 50, s. 98, empowers the Cour before which any indictment is preferred "for not repairing highways" to give the prosecutor costs if the defence appear to have been frivolous, it appears, on reference to the interpretation clause, sect. 5, that the word "highways" does not include county bridges. The costs, therefore, could not be given under that Act. \*But stat. 13 Geo. III. c. 78, s. 64, enacts "that it shall and may be lawful for the Court before whom any indictment or presentment shall be

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tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said Court that the defence made to such indictment or presentment was frivolous." And by stat. 43 Geo. III. c. 59, s. 1, it is enacted that the surveyor of bridges in every county in England may take materials for the repair of county bridges and the roads at the ends thereof, and may remove obstructions from such roads and bridges, in such and the same manner as surveyors of highways are authorized so to do by stat. 13 Geo. III. c. 78: and that "the several powers and authorities thereby vested in the surveyor or surveyors of highways, as well for the getting of materials as the preventing and removing of all nuisances and annoyances from such bridges and roads, shall be and the same are hereby vested in the surveyor and surveyors of county bridges, and the roads at the ends thereof as aforesaid; and the several penalties, forfeitures, matters, and things, in the said Act contained, relating to highways, shall be and the same are hereby extended and applied, as far as the same are applicable, to such bridges, and the roads at the ends thereof as aforesaid, as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." Stat. 5 & 6 Will. IV. c. 50, s. 1, repeals stat. 13 Geo. III. c. 78, but not stat. 48 Geo. III. c. 59; and therefore the Act of 13 Geo. III. still remains in force, so far as it is incorporated in stat. 43 Geo. III. c. 59; that is, so far as its provisions are applicable to those of the latter Act. The Judge who tried the case is the proper authority to \*certify under stat. 5 & 6 of Will. IV. c. 50, s. 98: Reg. v. Pembridge (1); and there the Judge was considered to have the same power as under stat. 13 Geo. III. c. 78, s. 64. The application for a rule in this Court to enforce payment of the costs was correct in practice: Reg. v. Preston (2). (These two points were not disputed.)

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## Godson and Hodges, contrà:

Stat. 5 & 6 Will. IV. c. 50, s. 1, enacts that stat. 18 Geo. III. c. 78, and other enumerated Acts "shall be and the same are hereby repealed:" the consequence is that stat. 48 Geo. III. c. 59, is repealed, so far as stat. 18 Geo. III. c. 78, is incorporated with it. The effect of stat. 48 Geo. III. c. 59, was to establish a new

<sup>(1) 61</sup> R. R. 433 (3 Q. B. 901).

<sup>(2) 7</sup> Dcwl. P. C. 593. See the earlier case of Reg. v. Preston, 2 Moo.

<sup>&</sup>amp; Rob. 137, and the comment upon both by Lord DENMAN, Ch. J. in Reg. v. Pembridge, 3 Q. B. 905.

subject-matter to which the prior Act might apply; the provision as to certifying for costs, in stat. 13 Geo. III. c. 78, s. 64, became THE INHABIreferable to proceedings for non-repair of bridges: but there is no MERIONETHreason to presume that, when that clause was repealed as to the matters comprehended in the same statute, the Legislature meant it still to operate on the subject-matters of stat. 43 Geo. III. c. 59. Nothing to this effect is contained in any provision as to costs in stat. 5 & 6 Will. IV. c. 50.

Reg. SHIRK.

(COLERIDGE, J.: According to your argument, there are no means now by which a prosecutor can recover costs if the defence is frivolous.)

The only provision as to costs in 5 & 6 Will. IV. c. 50, is in sect. 95.

(Welsby: That applies only to the case of an indictment directed by justices, where the parties are heard on summons and the liability disputed.)

Further, the object of stat. 43 Geo. III. c. 59, appears, by \*sect. 2, to have been the enabling of justices in Quarter Sessions to widen and improve bridges; and the enactment incorporating the provisions of stat. 13 Geo. III. c. 78, must be understood as referring only to such improved bridges.

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(COLERIDGE, J.: There is nothing in sect. 1 which so limits the reference.)

#### LORD DENMAN, Ch. J.:

There is certainly a difficulty in applying the clauses which have been cited. Stat. 5 & 6 Will. IV. c. 50, repeals stat. 18 Geo. III. c. 78; and, although it contains a clause (sect. 98) as to costs of frivolous defences, that, by the express provision of sect. 5, is not applicable to county bridges. But then stat. 43 Geo. III. c. 59, s. 1, after giving increased power to the surveyors of county bridges, enacts that "the several penalties, forfeitures, matters, and things," contained in the former Act, relating to highways, shall be "extended and applied, as far as the same are applicable," to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." Therefore, supposing that the statute of 5 & 6 Will. IV. does not apply to this matter in any way, the question still is whether stat. 48 Geo. III.

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c. 59, which is unrepealed, does not keep alive the power given by stat. 13 Geo. III. c. 78, s. 64. And I think it must be taken to do so. If the words of that clause had been expressly repeated in stat. 43 Geo. III. c. 59, s. 1, the power would have been fully reserved: and the only question now is whether, in effect, the words "penalties, forfeitures, matters, and things," do not include proceedings on an indictment for non-repair of a bridge. I know nothing which can be more to the purpose of this clause than an indictment for not repairing a \*bridge, and the defence to such indictment. I think, therefore, though I have not come to that decision without some difficulty, that the preponderance of argument is in favour of the conclusion that stat. 43 Geo. III. c. 59, keeps alive the power as to costs created by stat. 13 Geo. III. c. 78, s. 64.

#### PATTESON, J.:

The question is difficult; but it turns wholly on the words of stat. 48 Geo. III. c. 59. By that Act, sect. 1, the several "matters, and things," contained in stat. 13 Geo. III. c. 78, relating to highways, are extended and applied to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." Now, if sect. 64 of the former Act had been in terms repeated and re-enacted in stat. 48 Geo. III. c. 59, it is clear that such an enactment of the statute last mentioned would not have been repealed by stat. 5 & 6 Will. IV. c. 50, s. 1. It is argued, however, that sect. 1 of stat. 43 Geo. III. c. 59, does not completely incorporate the provisions of stat. 13 Geo. III. c. 78, but only makes it lawful to apply those provisions to the case of a county bridge so long as the Act exists, and not longer. I think that is not so. The enactments give the same effect to stat. 48 Geo. III. c. 59, as if this latter actually contained the clauses referred to of stat. 13 Geo. III. c. 78.

#### Williams, J.:

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It is impossible to say that this question is without doubt. One thing is clear: that stat. 5 & 6 Will. IV. c. 50, s. 98, has no bearing upon it. It certainly appears strange that, when an Act of Parliament is per se abolished, it shall virtually have effect through another Act. But any difficulty which that may raise is \*met by the manner in which the earlier Act is introduced in stat. 48 Geo. III. c. 59: "as if the same" "were herein repeated and

To save the trouble of incorporating it in terms, re-enacted." they do so by relation; but the provisions are made part of stat. THE INHABI-43 Geo. III. c. 59, as much as if they were expressly incorporated.

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#### COLBRIDGE, J.:

There is a difficulty of construction in this case: but it is conceded that, before stat. 5 & 6 Will. IV. c. 50, a certificate according to stat. 18 Geo. III. c. 78, s. 64, might have been granted. Then what effect has been produced by stat. 5 & 6 Will. IV. c. 50, s. 1? It has repealed stat. 13 Geo. III. c. 78; and the certificate, if it stands on that Act merely, is useless. But the question is whether stat. 43 Geo. III. c. 59, merely gave the liberty of adopting the provisions of stat. 13 Geo. III. c. 78, while in force, or whether part of the Act last mentioned was, in effect, put into stat. 43 Geo. III. c. 59. In the latter case the provision as to costs will remain untouched. And I think it does. The effect of stat. 43 Geo. III. c. 59, s. 1, in my opinion, was, not only that the applicable clauses of the former Act should extend to bridges, but also that they should stand as if contained in the Act then passed.

Rule discharged.

# ALDRED v. CONSTABLE AND CHARLES BROWN (1).

(6 Q. B. 370-382; S. C. 8 Jur. 956.)

Trover against sheriff for goods particularly described in the declaration. Plea, that defendant seized and sold the goods under a fi. fa., at the suit of J. Replication, that the conversion complained of in the declaration is not the seizing and taking of the goods in the plea mentioned under the said writ, and that plaintiffs sue, not in respect of such seizing and taking, nor of goods seized, taken and sold under the said writ, but for that plaintiffs were lawfully possessed of the goods in the declaration mentioned, which were other than and different from the goods seized &c. by defendants under J.'s writ, and that defendants converted and disposed of the said goods in the declaration mentioned &c. Plea, Not guilty.

It was proved that the sheriff received J.'s writ, and seized under it goods of the debtor, including those claimed in the action of trover: he then received a writ at the suit of C., which afterwards proved invalid. receiving the second writ he sold the goods on two successive days. The first day's sale produced enough to satisfy J.'s writ: the action of trover was brought by the assignees of the debtor (who had become bankrupt) for the goods sold after J.'s execution was satisfied.

Held, that the sale was not to be considered entire and indivisible; but that the sheriff, after selling enough to satisfy the first writ, was liable in trover for the goods sold beyond that amount (1).

And that plaintiffs were right in new assigning, and ought not to have

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<sup>(1)</sup> See Re Pearce, Ex parte Crossthwaite (1885) 14 Q. B. D. 966, 969, 54 L. J. Q. B. 316.—A. C,

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pleaded a mere traverse of the allegation that the goods were sold under J.'s writ.

A sheriff, after selling enough to satisfy an execution, is not justified in selling more on the supposition that, by accident for which he is not answerable, the amount levied may become insufficient.

TROVER for 200 stone bottles, and other goods and chattels specifically described, and laid to have been in the possession of the plaintiffs as assignees of John Brown, a bankrupt.

Pleas, by defendant Constable. 1. Not guilty. 2. Plaintiffs not assignees in manner and form &c. (1). 3. Not possessed. Issues thereon.

4. That John Brown was a trader &c.: the plea then alleged a petitioning creditor's debt; and that John Brown became bankrupt; and that afterwards, and before the committing of the grievances, &c., one James Brown sued out of the Queen's Bench a fi. fa. against John Brown, directed to the Sheriff of Yorkshire. which writ, indorsed to levy &c., was delivered to defendant Constable \*then being Sheriff of Yorkshire, to be executed; and he. being such sheriff, after the bankruptcy and before fiat, to wit on &c., seized the goods in the declaration mentioned for the purpose of levying the said moneys as by the writ he was commanded, and did afterwards, to wit on &c., and before fiat, by sale thereof levy the said sums of money as by the writ he was commanded; and that the said goods were, immediately before and at the time of the bankruptcy. the property of John Brown, and liable to be taken and seized under the writ; that afterwards, to wit May 6th, 1840, a fiat issued against John Brown, under which he was adjudged a bankrupt, and (after the requisite proceedings) the plaintiffs were chosen and became assignees, and, as such, entitled to the possession of the goods as from the time when John Brown became bankrupt; which possession is the possession of the plaintiffs as assignees in the declaration mentioned. Averment, that the fi. fa. was bona fide executed and levied, and the goods and chattels seized, by the defendant Constable, as sheriff, before the date and issuing of the fiat; that James Brown and defendant Constable had not, at the time of executing or levying, notice of any prior act of bankrupter committed by John Brown; that the judgment on which the writ issued was not founded on any warrant of attorney or cognorit given by John Brown by way of fraudulent preference; and that the seizing under the said writ is the conversion in the declaration mentioned. Verification.

(1) This plea was withdrawn. See note (a) to Aldred v. Constable, 4 Q. B. 674.

"That the conversion in the said declaration Replication. mentioned and complained of was not and is not the seizing and taking the goods and effects in the said fourth plea mentioned under and by virtue of the said writ at the suit of the said James Brown; and that \*plaintiffs issued their writ and declared, and brought their action, against the said defendants, not for or in respect of such seizing and taking, nor for or in respect of goods and effects which were seized and taken and sold under and by virtue of the said writ, but for that the plaintiffs, as such assignees as aforesaid. to wit on the said day in the said declaration mentioned in that behalf, were lawfully possessed of the said goods and chattels in the said declaration mentioned, and which said goods and chattels were other and different than the said goods and effects which were seized and taken and sold by the said defendant Constable under and by virtue of the said writ at the suit of the said James Brown; and for that the defendants afterwards, to wit on the same day in the said declaration in that behalf mentioned, converted and disposed of the said goods and chattels in the said declaration mentioned to their own use." Verification.

Plea to the new assignment: Not guilty.

5. Plea like the 4th, only stating a fi. fa. at the suit of Charles Brown. Replication, admitting the bankruptcy, seizure and sale under the fi. fa., property in John Brown before the bankruptcy, fiat, appointment of plaintiffs, and their title and possession, as assignees; De injuria as to the residue. Issue thereon.

Charles Brown pleaded separately. The parts of the record affecting him exclusively are immaterial to this report.

This cause was tried a second time (1), before Wightman, J., at the York Summer Assizes, 1843. It appeared, as before, that the warrant of attorney on which Charles Brown obtained judgment and execution was given under circumstances which, as was said, showed a fraudulent \*preference. After seizure, and before sale, the plaintiffs, referring to Charles Brown's execution only, gave the sheriff notice that John Brown had committed an act of bankruptcy on which a fiat was about to be issued. The other parts of the evidence material to the present report, and the points taken for the defendants, were stated as follows in the judgment of this Court delivered as after mentioned.

(1) See Aldred v. Constable, 4 Q. B. 674. [The point there decided has become obsolete: see Bankruptcy Act,

1883 (46 & 47 Vict. c. 52), s. 48, and Butcher v. Stead (1875) L. R. 7 H. L. 839, 846, 44 L. J. Bk. 129.—A. C.]

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"Upon the evidence it appeared that on the 23rd of April the sheriff received the writ at the suit of James Brown under which he justified; and that on the 24th of April he received a fi. fa. at the suit of Charles Brown for 313l. 11s. The sheriff had seized all the goods of the bankrupt under the writ at the suit of James Brown before he received the writ at the suit of Charles Brown: but he remained in possession under both writs until the time of the sale, which took place on the 28th and 29th of April. The first day's sale of the goods produced more than sufficient to cover and satisfy the writ at the suit of James Brown. remained, however, at the end of the first day's sale, as many goods that had been seized by the sheriff under the two writs as produced at the sale on the following day 1491.: and the plaintiffs contended that they were entitled to a verdict upon the new assignment in respect of those goods."

part of the goods as not having been taken and sold under James Brown's writ, they should have traversed the allegation in the plea that they were so taken and sold, instead of new assigning, whereby they in effect admitted that all the goods were covered by the plea. And they urged that, in fact, the sale was one \*continuous proceeding, and was, throughout, a sale under James Brown's execution. Also, as to the sheriff, that he was not liable, being bound to enforce the writ without reference to the merits of the execution. (This point was not insisted upon in Banc.) And that, if the sheriff had sold illegally, trover was not the proper form of action.

The defendants answered that, if the plaintiffs meant to claim

The learned Judge reserved the points, and left it to the jury to say whether the warrant of attorney on which Charles Brown had obtained judgment and execution was given by way of fraudulent preference. Verdict for plaintiffs on the 1st, 3rd, 4th, and 5th issues; damages 149l., (the produce of the second day's sale). Leave was given to move that the verdict against Sir T. A. C. Constable should be set aside and a verdict entered for him.

Wortley, in Michaelmas Term, 1848, obtained a rule sist accordingly.

Martin now showed cause (1):

As to the form of proceeding, Cheston v. Gibbs (2), decided since (1) Before Lord Denman, Ch. J., (2) 12 M. & W. 111.
Patteson, Williams and Wightman, JJ.

the granting of this rule, shows that the action is rightly brought in trover.

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(Wortley, contrà, said he should not dispute this.)

Then, as to the new assignment (1). The statement, in the fourth plea, of a levy under James Brown's writ was matter which the plaintiffs did not propose to dispute; their case was that, after selling to satisfy that execution, the sheriff went on to sell under a void writ: therefore they could answer the plea only by a new \*assignment, alleging that the conversion of which they complain is not the seizure and sale of the goods mentioned in the plea, and under James Brown's writ, but the conversion of other and different To that new assignment the goods in the declaration mentioned. defendants plead only Not guilty; and upon that issue the evidence entitles the plaintiffs to recover, Not guilty putting in issue nothing but the fact of conversion. The seizure and sale, as far as they were necessary to satisfy James Brown's writ, were lawful, and this would have been the answer under the fourth plea; but, as soon as the sheriff sold more than was requisite for James Brown's execution. he became liable in trover, according to Stead v. Gascoigne (2); and this view of the case is met by the new assignment. In Batchelor v. Vuse (3) Tindal, Ch. J. said; "The law allows the sheriff to seize a reasonable quantity of the debtor's goods: but he must know when he has sold enough to satisfy the execution. Stead v. Gascoigne (2) is a direct authority. The case certainly was not much argued; but it was treated as an authority by Mr. Justice LITTLEDALE in Norman v. Bell" (4).

#### Wortley, E. V. Williams and E. Beavan, contrà :

It is not necessary to dispute that, if the sheriff, after satisfying the valid writ, proceeded to sell under a void writ, he would be liable in trover: the question is whether that is the state of things suggested by the new assignment. The declaration alleges a seizure and \*conversion of certain goods which are particularly described: the plea justifies as to all those goods: then the plaintiffs new

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- (1) As to new assignments see and compare R. S. C., 1875, Ord. XIX. r. 14; R. S. C., 1883, Ord. XXXIII. r. 6; R. S. C., 1902, r. 7. Matter in the nature of a new assignment should now be introduced by amendment of the statement of claim.—A. C.
  - (2) 8 Taunt. 527,

- (3) 4 Moo. & Sc. 552; S. C. at Nisi Prius, 1 Moo. & Rob. 331; and see p. 333, note (b).
- (4) 2 B. & Ad. 190. Stead v. Gascoigne is not expressly cited: but see the observation of Littledale, J. at p. 191.

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assign, that they sue in respect of goods other than and different from those stated in the plea to have been seized. The effect of this is, that the plaintiffs abandon the matter of complaint answered by the plea. [They cited Dand v. Kingscote (1), Barnes v. Hunt (2), Greene v. Jones (8), Norman v. Westcombe (4), Bull. N. P. 92, Pratt v. Groome (5), and Oakley v. Davis (6).] Here the plaintiffs, by their new assignment, undertake to show that the goods as to which they complain are a different set of goods from those mentioned in the plea, and which they admit to have been seized and sold as there stated (7).

(Patteson, J.: The new assignment is good in point of language; and it is a question on the evidence whether there were two sales or one. It is as if the action were trover for horses, and, the defendant justifying under a writ, the plaintiff new assigned, and said at the trial, "You seized a black horse and a grey; the black horse sold for as much as satisfied the execution; and you then sold the other: we do not sue for the black horse, but for the grey."

LORD DENMAN, Ch. J.: The question there would be upon the evidence.)

The plaintiffs were bound to prove that some particular thing was sold which was not a subject of the first execution.

(Patteson, J.: It comes to the question whether, when a sheriff has two writs of execution, and, after selling enough to satisfy the first, proceeds \*with the sale, he must not be taken to sell under the second.)

"As soon as" the goods "are seized, they are, in point of law, in his custody under all the writs which he then has; and, when he sells them, he sells, in point of law, under all the writs:" Drevev. Lainson (8), judgment of the Court. The sale is continuous and not divisible. If enough goods to satisfy the first execution were sold on the first day, but part of them were accidentally destroyed or lost, the first execution creditor might demand the proceeds of the goods sold after the first day, until he was satisfied; and the

- (1) 55 R. R. 560 (6 M. & W. 174, 197).
- (2) 11 East, 451. See the observation of LITTLEDALE, J. in Bowen v. Jenkin, 6 Ad. & El. 911, 919.
- (3) 1 Wms. Saund. 300 a, 6th ed.
- (4) 2 M. & W. 349.
- (5) 15 East, 235.
- (6) 16 East, 82, 86.
- (7) See note (f) to Greene v. Jones, 1 Wms. Saund. 299 a, 6th ed.
  - (8) 11 Ad. & El. 529, 537.

sheriff must be prepared to meet such demand, though he might perhaps be liable in an action for negligence by the second creditor, CONSTABLE. if he, in consequence, suffered loss.

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Cur. adv. vult.

LORD DENMAN, Ch. J., on a subsequent day of this vacation (July 6th), delivered the judgment of the Court:

The only questions in this case arose upon the new assignment upon the fourth plea. The declaration was in trover in the usual general form. The defendant Constable, in the fourth plea, states that a writ of fi. fa. at the suit of James Brown, indersed to levy 791. 4s. 9d., was delivered to him (he being Sheriff of Yorkshire) before the issuing the fiat against John Brown; and that he, as sheriff, before the fiat, seized and took in execution the goods in the declaration mentioned, for the purpose of levying the money mentioned in that writ, and did, before the fiat, by sale thereof levy the said money as by the said writ he was commanded. To this \*plea the plaintiffs new assigned that they brought their action, not in respect of goods seized, taken and sold under the writ mentioned in the plea, but for goods and chattels other and different than the goods and chattels which were seized, taken and sold under the said writ in the fourth plea mentioned. To this new assignment there was a plea of Not guilty. (His Lordship then stated the material facts proved on the trial, as at p. 423, ante.)

The defendant contended: 1. That the plaintiffs, by new assigning, had admitted that all the goods mentioned in the declaration were covered by the plea; and that they ought not to have new assigned, but traversed the allegation in the plea that the goods were taken and sold to satisfy the writ at the suit of James Brown; and, 2. That the sale, though in two days, was in fact but one sale, and that sale under the execution at the suit of James Brown; for that, although enough was raised at the first day's sale to satisfy James Brown's execution, the sheriff might nevertheless sell more under that writ in order to protect himself, in case, after the sale, and before delivery of the goods sold to the purchasers, some unforeseen loss, as by fire or thieves, might occur, which would render the produce of the first day's sale insufficient to satisfy James Brown's writ. Upon both of these points, however, our opinion is in favour of the plaintiffs.

We think a new assignment was the proper mode of pleading in this case on the part of the plaintiffs. The declaration is general, [ \*380 ]

ALDRED v. CONSTABLE. [ \*381 ] and may apply to any goods within the number and description stated in it. The defendant says that he seized, took and sold the goods mentioned in the declaration under a writ of fi. fa. at \*the suit of James Brown, and so justifies. This apparently answers the declaration; for the defendant did seize, take and sell some goods, within the number and description in the declaration, under that writ; and, the declaration being general, it may be that the goods seized and sold under that writ were the goods for which the plaintiff brought his action. But the plaintiff, admitting that the defendant did seize and sell certain goods within the number and description of these stated generally in the declaration, says by his new assignment that the goods in respect of which he brought his action, and which he named in his declaration, are not those seized and sold under James Brown's writ, but other goods. And this is the proper mode of pleading in such a case, a new assignment being used to explain matters alleged generally in the declaration and only apparently answered by the plea.

The question then becomes one of fact, whether all that was sold at both sales was sold under the writ at the suit of James Brown: and upon this part of the case the second point made by the defendant arises.

The cases of Stead v. Gascoigne (1) and Batchelor v. Vyse (2) are direct authorities that, if a sheriff sell more goods than are sufficient to satisfy an execution, he is liable in trover in respect of the excess. Whether he sold more than under the circumstances was necessary, is a question of fact in each particular case; and, in the present, there is no doubt that the produce of the first day's sale was sufficient to satisfy the execution at the suit of James Brown: and we are of opinion that the sale on the second day was not warranted by James \*Brown's writ, and that the goods sold on that day cannot be considered sold under that writ. We also think that, primâ facie, a sheriff's sale is to be considered to be for ready money and immediate delivery, and that the sheriff is not justified, after he has sold as much as apparently satisfies the writ, in going on to sell more upon a speculation that it is possible that actual delivery of such goods as he has already sold may be prevented by some loss or accident for which he is not answerable.

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This rule therefore will be discharged; and the verdict for the plaintiffs upon the new assignment will stand.

Rule discharged.

### ELWOOD v. BULLOCK (1).

1844. [ 383 ]

(6 Q. B. 383 -413; S. C. 13 L. J. Q. B. 330; 8 Jur. 1044.)

The council of a borough made the following bye-law, by virtue of a charter empowering them to make bye-laws, and of stat. 5 & 6 Will. IV. c. 76, s. 90 (2).

That no person should erect any booth for the purpose of any show or public entertainment in any public place within the borough without licence from the mayor, which licence should not be given at or for any other time than during the annual fairs if three inhabitant householders, residing within 100 yards of the place intended to be used, should have previously memorialized the mayor in writing to withhold such licence: and that any such licence given at or for any other time than during the said fairs should be revoked by the mayor and become void, if and so soon as three inhabitant householders residing within 100 yards &c. should memorialize the mayor in writing to revoke the same; such last-mentioned memorial to be presented within forty-eight hours after the building of such booth should have been commenced, and the revocation to be notified forthwith to the party employed or interested in the building: and any person erecting or continuing a booth in contravention of the bye-law to forfeit a sum not exceeding 51.:

Held an unreasonable bye-law, and wholly void, though duly published and notified to a Secretary of State and not disallowed.

To a count in trespass for breaking down and removing plaintiff's booth, defendant pleaded that, before and at the time when &c., there was a public highway, through, over and along a close called A., for all the liege subjects &c.; and that the booth had been and was wrongfully erected and standing in and across the said highway, and obstructing the same, wherefore defendant, being a liege subject &c., and having occasion to use the said highway, committed the alleged trespasses, in order to remove the obstruction. Replication: That the said close is in the borough of B., which is an immemorial borough, and that an immemorial fair for the sale of all kinds of goods was, for three weeks from a certain day in every year, holden in the said close, that is to say on certain parts thereof used for that purpose, but leaving open a sufficient part of the said close, and also of the said highway, for the subjects &c. to go, return, pass, &c. in and along the same highway. And that there was an immemorial custom in the said borough, that every liege subject using the trade of a victualler hath, during the said fairs, been used &c., for the purpose of carrying on his said trade, to enter upon any part of the said close used for the purpose of such fair, but leaving as aforesaid, and, for carrying on his said trade, to erect a booth there, and to continue such booth until a reasonable time after the end of such fair, paying a reasonable compensation to the owner of the soil. plaintiff, being a liege subject and a victualler, did, during such fair, erect his said booth on one of the parts of the said close then and theretofore used for the fair (leaving as aforesaid), according to the custom, and continued such booth there till defendant, during the fair, committed the trespasses:

Held, on demurrer, that the custom was reasonable, for that a highway

M. C. 105.—A. C.

<sup>(1)</sup> Appr. Arnold v. Blaker (1871) L. R. 6 Q. B. 433, 437, 40 L. J. Q. B. 185; dist. Simpson v. Wells (1872) L. R. 7 Q. B. 214, 216, 41 L. J.

<sup>(2)</sup> See now Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23. —A. C.

ELWOOD e. Bullock. might have been granted before legal memory, subject, in parts, to interruption for a beneficial public purpose and for a limited time.

And that the plaintiff was right in replying specially as above, and could not have traversed the existence of a highway over the *locus in quo*, because, consistently with the custom, that spot might sometimes be used as a highway and sometimes not, and it did not, by temporary occupation under the custom, cease to be a highway.

Issues being joined in law and in fact, the plaintiff, after judgment for him on the former, the latter being untried, obtained a rule to discontinue on payment of costs. On taxation, the Master made his allocatur for the plaintiff's and defendant's costs respectively, not striking a balance. The plaintiff, to whom the larger sum was due, took out execution for the balance between his costs and the defendant's:

Held, that he was entitled to his costs of demurrer notwithstanding the discontinuance. And

The Court refused, on motion, to set aside the execution as irregularly issued for a balance instead of the gross sum awarded for costs.

The declaration stated that defendant, on &c., with force and arms, at Bury St. Edmund's in Suffolk, in a certain close there called the Angel Hill, \*broke and entered a certain booth or building of plaintiff, then standing, erected and being in the said close, and commonly called and known as the Harp, and before that time used by plaintiff for the purpose of therein selling liquors, and then and there took down, pulled down, &c. and destroyed the said booth, and broke to pieces, took, and carried away and converted, the materials; and also seized and took plaintiff's goods and chattels, to wit &c., there then found &c., of a large value &c., and broke &c., and took, carried away and converted the same: by means whereof the goods were lessened in value &c., and also, by means of the booth being pulled down, &c., plaintiff was prevented from selling divers large quantities of liquors and provisions therein, and from exercising and carrying on his trade of a victualler therein, and thereby making gains &c.

Plea 2. That the borough of Bury St. Edmund's is, and from time whereof &c. hath been, an ancient borough; and that the burgesses thereof, until the making of an Act passed &c. (5 & 6 Will. IV. c. 76), and until the first election of councillors under the said Act, had been and were a body corporate and politic by the name of The Alderman and burgesses of Bury St. Edmund's in the county of Suffolk, and from thence hitherto have been, and still are, a body corporate &c., by the name of The Mayor, aldermen and burgesses of Bury St. Edmund's. That, by letters patent, April 3rd, 4 Jac. I. (profert), the King granted to the said corporation and their successors that the alderman for the time being, and the assistants of the said borough for the time being, or the greater

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part of them, and the chief burgesses for the time being, or the greater part of them, and the common council for the time being, or the greater part \*of them (of whom the alderman for the time being was to be one), upon public warning thereof to be given to congregate themselves together, "should have full power and authority to make and constitute and ordain from time to time good, wholesome, profitable, honest and necessary laws, statutes, constitutions, decrees, and ordinances reasonable in writing whatsoever, which to them or the greater part of them as aforesaid, according to their discretions" &c., "should seem to be for the good regimen and government of the borough aforesaid and all and singular officers," &c., "inhabitants and residents of the borough aforesaid, in their offices," &c., "arts and businesses within the borough aforesaid and liberties and precincts of the same for the time being, which they should have, bear and use for the further public good, common profit and good government of the borough aforesaid, and the victualling the same, and for other the things and causes by any manner of way touching the said borough. by the said letters patent" &c. The plea then averred acceptance of the letters patent, which are still in force, except so far as the same are repealed or annulled by stat. 5 & 6 Will. IV. c. 76. And that, after the passing of that Act, and before the time when &c., and more than twelve calendar months before the commencement of this suit, to wit on &c., defendant, being duly qualified, had been elected mayor, &c., and had subscribed the declaration &c.; and that he continued mayor until after the committing of the supposed trespasses, to wit until &c.; and was during all that time a justice of peace for the borough, and had duly taken the oaths required in that behalf. The plea then stated the election, more than twelve calendar months before action brought, of aldermen, and of councillors (among \*whom was the defendant) duly qualified, who respectively subscribed the declarations &c., and who remained in office until after the committing &c., and which aldermen and councillors constituted and acted as the council of the borough on the 20th February, 1843, and until after the committing &c. And that, while they so constituted such council, and before the time when &c., to wit on February 20th, 1843, a quarterly meeting of the said council for the transaction of general business was duly holden &c. (the plea stated particularly the notices and the other due preliminaries to the holding of such meeting). And that more than two thirds of the whole number of the council, to wit &c.

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ELWOOD e. BULLOCK. (naming them), were present at the said meeting and at the making of the bye-laws after-mentioned; and defendant presided &c. thereupon it then seemed meet to the said council to make &c., and they did then accordingly, to wit on &c., at the said meeting, by virtue and in pursuance of the Act of Parliament in such case &c., and of all powers &c. granted by any charter or charters to the mayor, aldermen and burgesses, &c., or by law inherent or otherwise vested in them or the said council in that behalf, duly make, &c., and declare divers, to wit twelve, bye-laws, statutes, &c., reasonable, in writing, for the good rule &c. (1) of the said borough, and for the prevention &c. of divers nuisances therein which were not already punishable in a summary manner &c., and by such bye-laws appoint divers fines which they deemed necessary for the prevention &c. of such offences, no fine so appointed exceeding 51. by one, to wit the eleventh, of which bye-laws it was and is ordained and declared:

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"That no person should thenceforth erect any booth or place any caravan, for the purpose of any show or public entertainment, in any public place within the said borough without the licence of the mayor thereof; and that such licence should not be given at or for any other time than during the time of the annual fairs, if three inhabitant householders, residing within 100 yards of the place intended to be used, should have previously memorialized the said mayor in writing to withhold such licence: and that any such licence given at or for any other time than during the time of the said fairs should be revoked by the said mayor and become void, if and so soon as three inhabitant householders, residing within 100 yards of the place for which such licence should be granted, should memorialize the said mayor in writing to revoke the same: provided such memorial as last mentioned should, in the case of any booth or other like erection being sought to be set up, be presented to the mayor within forty-eight hours next after the building of any such booth or erection should have been commenced; and that the revocation of such licence should forthwith be notified by the mayor to some person or persons employed or interested in the building of any such booth or other erection: And that, in case any person should erect or cause to be erected wholly or partially any booth or other like erection or place, or cause to be placed any caravan for the purpose of any show or public entertainment, in any public place within the said borough, without the licence of the mayor, or, VOL. LXVI.

after the revocation of any such licence should have been notified to him, should refuse or neglect to remove such caravan or the materials of such booth or other like erection within the time prescribed \*by the said mayor in that behalf, such person should forfeit and pay a sum not exceeding 51.; and that in every such case it should be lawful for the said mayor, whether the said penalty should have been sued for or not, to cause every such booth or other like erection, whether completed or not, and every such caravan, to be removed from and out of the limits of the said borough: provided that that bye-law should not be construed to give any greater effect to the licence of the said mayor than the same would have had if that bye-law had not been made." the said laws, &c., will (among other things) fully appear.

The plea then averred notice of the said bye-laws to one of the Secretaries of State, and publication by affixing on the door of the town hall (1); and entry and signing of minutes of the said proceedings in council (2); that the bye-laws were not disallowed &c. within forty days (1) after notice and publication; and that, immediately after the expiration of forty days &c., to wit on &c., and before the time when &c., the same came into effect.

The plea then went on to state that, before and at the time of the making of an Act &c. (the Parliamentary Boundary Act, 2 & 3 Will. IV. c. 64), the close called the Angel Hill, in the declaration mentioned, was, and from thence hitherto hath been, and still is, part of and situate within the said borough, "and the same close was and is a common and public place and Queen's highway, situate in the middle of the said borough; of all which premises" &c. (notice to plaintiff before the time when &c.). And defendant further saith that plaintiff, disregarding the said bye-law, afterwards, and before the said time when \*&c., to wit on &c., without the leave or licence, and against the will and consent, of the defendant, so being such mayor as aforesaid, unlawfully erected, put up and placed, and caused to be erected &c., the said booth in the declaration mentioned in and upon the said close called the Angel Hill, so being such common and public place and highway as aforesaid, for the purpose of public entertainment, and of causing, procuring and encouraging public dancing, lewdness, drunkenness and debauchery in and about the said booth: and plaintiff then also put and placed the said goods and chattels in the declaration mentioned in and upon the said booth for the purpose aforesaid;

(1) Stat. 5 & 6 Will. IV. c. 76, s. 90. (2) Stat. 5 & 6 Will. IV. c. 76, s. 69. 28

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and then, to wit on &c., opened the said booth for the purpose aforesaid, and caused the same to be kept and continued open for such purpose from thence until and at the said time when &c.: and plaintiff did during all that time unlawfully and injuriously keep, maintain and continue the said booth an ill governed and disorderly booth, and for his own lucre and gain did unlawfully and wilfully cause and procure divers and very many dissolute and debauched persons, as well men as women, of evil name and fame and of dishonest conversation, and as well inhabitants of the said borough as others, to frequent, assemble and come together with drums and trumpets and other instruments at and in and about the said booth at unlawful times, as well in the night as in the daytime, and then and there to be and remain beating drums, blowing trumpets, dancing, drinking, tippling, whoring and misbehaving themselves, and raising and making riots, affrays, uproars, loud noises and disturbances, for divers long spaces of time, to the subversion of the good rule, order and government of the said \*borough, and to the great annoyance and damage and common nuisance of all the liege subjects &c., there inhabiting, being, residing and passing, to the evil example &c., and in breach of the peace of our said lady the Queen: whereupon defendant, so being such mayor of the said borough as aforesaid, then, to wit on &c., gave notice to and required plaintiff to discontinue and put an end to such nuisance, and remove the said booth, together with the said goods and chattels so put and placed therein and thereupon as aforesaid, by two of the clock in the afternoon of the 12th October then next following, the same being a sufficient and reasonable time in that behalf: but plaintiff wholly refused so to do, and, on the contrary thereof, until and after the expiration of the said last mentioned period of time, and until and at the said time when &c., kept and continued the said booth so erected in and upon the said close, and kept and continued the said goods and chattels therein and thereupon for the purpose aforesaid, and kept and continued the said booth open for the purpose aforesaid; and during all the time last aforesaid kept, maintained and continued the said booth in the ill governed and disorderly manner aforesaid, and caused and procured the said improper and disorderly conduct to be continued at and in and about the said booth: whereupon defendant, so being such mayor and justice of the peace as aforesaid, afterwards and after the expiration of the said period of time so prescribed for the removal of the said booth, goods and chattels as aforesaid, at the said time when &c., in order to abate and remove the said nuisance and to restore and preserve the peace and the good rule, order and government of the said borough, and in pursuance of the said bye-law, \*broke and entered &c., and seized and took &c. (justifying in the usual form), doing no unnecessary damage &c., and as the defendant lawfully &c. Which are the supposed trespasses &c. Verification.

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Demurrer, assigning as a cause, among others, that the eleventh bye-law "is an unreasonable and improper bye-law, and is in restraint of trade, and always was, and is, invalid and void, and of no force or effect whatsoever." Joinder in demurrer.

That, before and at the said time when &c., there Last plea. was, and of right ought to have been, a certain common and public Queen's highway into, through, over and along the said close called the Angel Hill, for all the liege subjects &c. to go, return &c., on foot and with horses, &c. and carriages at all times of the year at their free will and pleasure; and that the said booth and the said goods and chattels, just before the said time when &c., had been respectively wrongfully erected, put up and placed, and were, at the said time when &c., respectively wrongfully standing, erected, being and remaining, in and across the said highway, and stopping up and obstructing the same, so that, without removing the said obstructions and committing the said supposed trespasses, the liege subjects &c. could not then pass and repass in and along the said highway as they were used &c., and of right &c. Wherefore defendant, being a liege subject &c., and having occasion to use the said highway, at the said time when &c., in order to remove the said obstructions and to open the said highway, broke and entered &c. (justification in the usual form). Verification.

Replication.

an ancient borough; and that the burgesses thereof, before and until the time of the making of a certain Act &c. (5 & 6 Will. IV. c. 76), and until the first election of councillors under the same, had been and were a body corporate &c., to wit by the name &c. (stating the names of incorporation before and after the statute): and that, from time whereof &c. hitherto, the said close called the

mentioned now is, and from time whereof \*&c. hitherto hath been,

That the said Bury St. Edmund's in the declaration

Angel Hill hath been and still is situate within the said borough: and that, from time whereof &c., on certain days in each and every year, to wit on 25th September, according to the old style and computation of time heretofore used in this kingdom, being the 6th

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day of October according to the new and present style and computation of time, and from thence for three weeks then next following. a fair for the buying and selling of all kinds of goods and merchandizes hath been, and of right ought to have been, and still of right ought to be, holden in the said close called the Angel Hill in the said borough, that is to say on certain parts thereof used for that purpose, but leaving and so as to leave open, unobstructed and unincumbered a sufficient part of the said close in the said declaration mentioned, and also of the said highway in the said last plea mentioned, for the subjects of this realm, with their horses, carts and carriages, to go, return, pass and repass in and along the same highway in the said last plea mentioned, freely and without hindrance or obstruction. And that, from time whereof &c. hitherto, and before and at the time when &c., there hath been. and of right ought to have been, and still of right ought to be, a certain ancient and laudable custom within the said borough and there used and approved of, that is to say, that every liege subject of this realm exercising the trade or \*calling of a victualler hath, during the said fairs, that is to say on the said 25th September &c., being the said 6th day of October according &c., and from thence for three weeks the next following in each and every year during all the time aforesaid, been used and accustomed, for the purpose of carrying on his said trade or calling at the said fairs, to enter, and of right, ought to have entered, and still of right ought to enter, into and upon any of the said parts of the said close called the Angel Hill used as aforesaid for the purpose of holding the said fairs, but leaving as aforesaid, and, for the more conveniently there carrying on his said trade or calling at and during the said fairs, to there erect a booth, and to put and place therein provisions, goods and chattels fit and proper for the more conveniently and beneficially there carrying on his said trade or calling, and to keep and continue such booth so erected, and such provisions, goods and chattels, fit and proper as aforesaid, so put and placed from thenceforth until a reasonable time after the end of each such fair as aforesaid for removing and carrying away from and off the said close such booth, provisions, goods and chattels; yielding and paying therefore to the owner or owners of the soil of the said close called the Angel Hill a reasonable compensation in that behalf, when the same should be lawfully demanded. ment that, before and at and after the said time when &c., one of the said fairs was held, A.D. 1843, in and on the said close called VOL. LXVI.]

the Angel Hill, to wit on certain parts thereof then and theretofore used for that purpose, and leaving as aforesaid, that is to say on 25th September &c., being &c., and for three weeks &c. And that plaintiff, then being a liege subject of this realm, and then exercising the \*trade or calling of a victualler, for the purpose of exercising and carrying on his said trade or calling at the said last mentioned fair, did, according to the said custom in this plea mentioned in that behalf, during the last mentioned fair, that is to say during such three weeks as last aforesaid, to wit on &c., enter into and upon one of the said parts of the said close called the Angel Hill then and theretofore used for the purpose of thereon holding the last mentioned fair, and, for the more conveniently there carrying on his said trade or calling at and during the said last mentioned fair, did, according to the said custom in that behalf, then and there, to wit on &c., on such part as last aforesaid of the same close, but leaving as aforesaid, erect a certain booth, being the said booth or building in the said declaration mentioned, and being a proper booth, and such a booth as the plaintiff might erect according to the said custom in this plea mentioned in that behalf, and put and placed in the said booth the said goods and chattels in the said declaration mentioned and alleged to have been seized and taken by the defendant, the same then being goods and chattels fit and proper for the plaintiff to put and place in his said booth for the more conveniently and beneficially carrying on his said trade or calling therein; and the said plaintiff kept and continued the said booth so erected as aforesaid, and the last mentioned goods and chattels so put and placed as aforesaid, from thence until the said defendant, during the last mentioned fair and before the same was ended, and during such three weeks as last aforesaid, and at the said time when &c. in the said declaration mentioned, to wit on &c. in the said declaration mentioned, unlawfully broke and entered the said booth of \*plaintiff as in the declaration mentioned, used by plaintiff as therein mentioned, and then and there took down &c. (restating the trespasses complained of in the declaration), in manner and form as the plaintiff hath above in his said declaration in that behalf complained &c. Averment, that, upon the occasion of his entering the said part of the said close as in this plea mentioned, and erecting the said booth as last aforesaid, and putting and placing in the said booth the said goods and chattels as last aforesaid, he the plaintiff was, and from thence hath been, and still is, ready and willing to pay the said

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ELWOOD & Bullock. Mayor, Aldermen and Burgesses of Bury St. Edmund's aforesaid, then and still being the owners of the soil of the said close, a reasonable compensation or sum of money in that behalf, to wit the sum of 5l. Verification.

Demurrer, assigning for causes: That the plea shows a general and unlimited highway and right of way over the Angel Hill, and every part thereof, for all the liege subjects &c., at all times &c.; and the replication purports to admit such right of way: nevertheless, it does in effect traverse and deny the same by allegation of matter showing that, from time whereof &c., there has not and could not have been such right of way, inasmuch as the replication alleges an immemorial and lawful holding of an annual fair &c., and an immemorial custom &c., the lawful holding and exercise of which are inconsistent with the rightful use of the said highway and right of way: That the replication does not state that the said highway has been legally stopped up, &c., or put an end to: That, if plaintiff meant to contend that his said booth and goods and chattels were not erected and put on, or obstructing, the said highway, he ought either to have replied according to the \*fact, or to have new assigned, or else to have replied as to part and new assigned as to other part: Also that the replication does not in any manner specify or show what parts of the said close were, from time to time, used for the purpose therein mentioned, nor describe the parts so used: Also that the replication does not show by what authority the particular parts of the said close, from time to time used for the said purpose, were appointed and chosen for that purpose: and it cannot be gathered from the replication that the same and identical parts of the said close were from time immemorial used for the said purpose, but nevertheless such replication does not allege or show any authority for at any time changing the place of holding the said fair: Also that the subject-matters of the replication are inconsistent with the enjoyment as of right, and with the simple fact of enjoyment, of the said highway and right of way in the last plea stated: Also that the replication is repugnant and self-contradictory, inasmuch as it states the lawful and actual holding of fairs on the said close and highway for the purposes therein mentioned, but leaving unobstructed a sufficient part of the close and highway for the subjects &c., with their horses &c., to go, return &c., freely and without hindrance &c., and further states a custom used and exercised &c. (reciting the material allegations of the plea as to the custom), whereas it is impossible

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for the said fairs ever to have been so holden, or for the said persons ever to have erected, or so to have erected, put or placed. such booth, provisions, goods or chattels, or so to have kept or continued the same, without causing hindrance and obstruction in and of the said public highway: Also that it does not allege that the booths, &c., which it is alleged to have \*been customary to erect, put, place, &c., or that the said booth, &c. of plaintiff, or any of them, were, in fact, erected, put, placed, &c. in the said close without causing hindrance and obstruction of and in the said highway: Also that the replication admits that the said annual fairs, and the said booths &c., which it is therein stated to have been customary to erect, &c., and the said booth, &c. of plaintiff, respectively, were and caused hindrances and obstructions to the liege subjects &c. having occasion to go, return &c. in and along the said highway, but does not attempt to justify such hindrances &c.: Also that plaintiff has not shown in what manner the compensations in the replication mentioned, or either of them, were or could be a compensation to the liege subjects &c. having right and occasion to use the said highway: Also that the replication does not with certainty either admit or deny the existence, at the time when &c., of the said highway, and of the said obstructions or either of them, and neither positively traverses, nor confesses and avoids, the last plea: Also that the replication amounts to a traverse or denial of the last plea, and as such ought to have concluded to the country: And that the replication is in other respects &c. Joinder.

The demurrers were argued last Term (1).

#### Gunning, for the plaintiff:

The bye-law is bad, because it directs imperatively that, except during fair times, the license to erect a booth shall be withheld if three inhabitant householders, residing within 100 yards of the place intended to be used, shall have memorialised \*the mayor to withhold such license; and, if granted, it shall be revoked, if and so soon as three such householders shall memorialise. This leaves no discretion to the public officer.

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(LORD DENMAN, Ch. J.: And does not make the withholding of the license depend on the party's own conduct.)

(1) June 7th. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

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ELWOOD v. Bullock. It does not require that a reasonable objection shall be made, or the owner of the booth called upon to show cause against the refusal or revocation. The memorialist may be a rival in business.

(LORD DENMAN, Ch. J.: Or may be offended because the party does not deal with him.)

And the objector need not be even an inhabitant of the borough.

(The Court gave judgment, as to this demurrer, on the above objection only: but several were stated; namely: 1. That the prohibition to erect a booth in "any public place" within the borough was too indefinite, and might extend to places which were not public highways, and which, therefore, could not legally be included in the prohibition. 2. That the bye-law professed to give a power of prohibition which might take effect though in restraint of trade, or tending to monopoly; and such a bye-law was invalid: Com. Dig. By-law (C 3); Trade (D 2); Ipswich Tailors' case (1), and authorities there collected, p. 53 b, note (A), Fraser's ed.; Case of Monopolies (2). 3. (This was the objection first stated, and on which the Court gave judgment.) 4. That the words "any booth or any other like erection" are ambiguous and too vague. 5. That the fine for erecting a booth without license, or not removing it within the time prescribed after revocation, should \*have been fixed by the bye-law: Wood v. Searl (3). Stat. 5 & 6 Will. IV. c. 76, s. 90, enables the council to appoint fines by their bye-laws, within the amount of 5l., but not to delegate the power of appointing them. 6. That the power to remove booths or caravans out of the limits of the borough cannot be necessary; and the bye-law gives no direction or limit as to the place to which they shall be carried.)

If the bye-law is bad in part, it is bad altogether: Com. Dig. By-law (C 7). And, if originally defective, it does not gain validity by having been affixed on the town hall and submitted to the Secretary of State and not disallowed: Stationers' Company v. Salisbury (4).

The Court desired to hear the other side as to the bye-law, before considering the demurrer to the replication.

(1) 11 Co. Rap. 53 a.

(2) 11 Co. Rep. 84 b, 87 b.

(3) J. Bridgm. 139

(4) Comb. 221.

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The bye-law here is not analogous to those which have formerly been under consideration, originating in local charters. This is a regulation purely of police, framed under the general Act 5 & 6 Will. IV. c. 76, s. 90, and receiving a public sanction by being affixed on the town hall and laid before a Secretary of State. object is, not to influence trade, but to regulate something which must, by its nature, be more or less a nuisance in any town. That the erection of booths should be controuled by some one is clearly necessary: the bye-law gives that controul to the mayor; and it is only at times other than those of the annual fair that he is bound to exercise it on the \*application of three inhabitants. Nor is it unreasonable that at periods other than the fair times, and at which booths are not ordinarily wanted, persons resident in the neighbourhood, who are the best judges of the convenience or inconvenience, should have the privilege of objecting to them. A power to interfere with the opening of shops would be very different. It is argued that such a bye-law makes the liberty of having a booth depend on the good will of individuals; but this is no sufficient objection to a law made for the prevention of nuisances. If the law be prima facie reasonable, the Court will not hold it void because the power may be unreasonably exercised. argument from possible abuse was suggested in Tyson v. Smith (1), where a customary right was claimed for every liege subject, being a victualler, during certain fairs, to erect a booth on that part of the waste of the manor on which the fairs were held; and it was said that, if the custom were good, so many booths might be erected at the fair as would impede business: but this Court held such an apprehension "altogether unreasonable and extravagant." (The rest of the argument in support of this plea is rendered immaterial by the judgment of the Court.)

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#### LORD DENMAN, Ch. J.:

We all think the third objection fatal. The whole bye-law must be taken together, and cannot stand if a part is bad. Now it is clearly unreasonable that three inhabitants of a neighbourhood should have power to prevent the erecting or continuing of a booth, merely because they think it ought not to be \*allowed. There are some bye-laws enabling parties to do acts prejudicial to others, on

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(1) 6 Ad. & El. 745. Affirmed on error, in Exch. Ch., 48 R. B. 539 (9 Ad. & El. 406).

ELWOOD r. BULLOCK. enquiry, or under other restrictions, which may be very reasonable; but here an absolute power of prohibition or removal is claimed, and cannot be supported. Mr. Watson argues that this is an enactment of police, and not in restraint of trade; but it is a police regulation executed by restraining trade. That such a regulation effects the purpose contemplated is an argument which might legalise any exercise of power. The judgment on this demurrer must be for the plaintiff.

#### PATTESON, J.:

The effect of this bye-law is, that a party may set up a booth, and then three persons, merely upon their own will and pleasure, order the mayor to remove it. That is clearly unreasonable.

#### WILLIAMS, J.:

This bye-law goes to a greater length than any rule of policy can warrant. The argument that some regulation of police is carried into effect by it might be urged for preventing the erection of a house. This bye-law might be used to prohibit, not only things having the consequences described in the plea, but things of an indifferent or even salutary kind. It includes "any booth," not only for the purpose of a show, but for that of "public entertainment," which may be scenic, or may be the supplying meat and drink for man and horse coming to the market, in which surely there is nothing unlawful. The regulation goes to an extent quite unreasonable. The will and pleasure, to which the license is made subject, may be that of the individual having the greatest personal interest in its being withheld.

# [402] COLERIDGE, J.:

Whether a bye-law is for the regulation of trade or for purposes of police, it must be reasonable and just. It is said that the object here is the prevention of nuisances. Suppose a party were indicted for such a nuisance: the evidence of three neighbours stating that they were annoyed would be a primâ facie case; but others might say that the thing complained of was a benefit to the neighbourhood; and it would be for a jury to decide. But under this bye-law any three persons living within the prescribed limit may memorialize, and ipso facto prevail. Such a law is clearly unreasonable.

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W. H. Watson was then heard in support of the demurrer to the replication:

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First, the replication is bad in form. The last plea alleges a highway for all the liege subjects &c. to go, &c. "at all times of the year." If there was any time, however short, during which they might not use the way, this plea is not true. But the plaintiff says there were times during which the way might lawfully be obstructed. Then he should have traversed the alleged right of way. Tyson v. Smith (1) was a different case from this; there the right asserted was to occupy part of the lord's waste; the owner of the booth claimed against the lord's lessee, not against the public.

(Patteson, J.: The plaintiff here does not deny the right of way: he only says that at certain times of the year persons attending the fair may limit you to a particular course. If there could be no such limitation of a right of way, no market could be held in the street of a town, which, however, is constantly done. And, if \*a market may be so held, I do not see why a fair may not, provided the way is not blocked up; and the plaintiff here does not allege a right to do that.)

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The plea asserts, in effect, a right of way over the very spot where the booth was placed; the replication must be taken to allege a custom to destroy the right of way pro tanto. Then the right, so far as the plea brings it in question, should have been traversed. The plaintiff should have said that he was not obstructing what was the highway.

(PATTESON, J.: That would be, that, at the particular time, the locus in quo was not part of the highway.)

It would. The replication, as it stands, neither denies nor confesses and avoids the right of way. The plaintiff might have replied a custom to exclude the public at certain times, without this, that at the time when &c. the public had a right to pass over the locus in quo. A new assignment extra viam would not apply to this case.

(PATTESON, J.: There it would be denied that any way at all existed over the locus in quo. Here a way does exist at times. If

(1) 6 Ad. & El. 745; S. C. in Exch. Ch., 48 R. R. 539 (9 Ad. & El. 406).

ELWOOD v. Bullock. the plaintiff had merely traversed the existence of the highway as pleaded, he must have been beaten, for the highway is made to extend over every part of the close.)

In Arlett v. Ellis (1), an action of trespass, the defendant justified in respect of a customary right of common throughout the close in which &c.: the plaintiff took issue on the custom, and proved a right in the lord of the manor (under whom he claimed) to inclose parcels of the waste, and that the locus in quo was comprised in a parcel inclosed by virtue of such right; and the pleading was held to be correct.

[\*404] (Patteson, J.: The \*plaintiff here could not have replied that the trespass was committed extra viam, unless the alleged right of way had been limited to a particular line. I do not see what he could have done but reply as he has.)

Secondly, a substantial objection is that the custom pleaded is bad. It would limit public rights for a private benefit. Supposing that the way had been dedicated to the public after the fair came into existence, the right of way could not have been pleaded as immemorial. But, by the replication, both appear to be so.

(LORD DENMAN, Ch. J.: Both rights may have arisen under the same original grant.

COLERIDGE, J.: The words in the replication, "leaving" "a sufficient part" "of the said highway" "for the subjects" &c. "to go, return," &c., import that the highway is at least as old as the custom.)

If the highway already existed, the Crown could not legally grant a fair to be holden upon it. Supposing the fair and the way contemporaneous, the grant must have been, not of a right of way at all times, but a right of way limited, and subject to the fair; a way to be enjoyed at certain times.

(Patteson, J.: The plaintiff does not say that this is not a way at all times, but only that it is not a way at all times over all parts.

COLERIDGE, J.: It may be said, however, in your favour, that we (1) 31 R. R. 214, 251 (7 B. & C. 346). See judgment of LITTLEDALE, J.

cannot see by this record that Angel Hill is different in extent of space from any other high road.)

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The claim is, on the part of certain persons, to exclude at particular times from what is confessedly the highway. It is like the claim in Fowler v. Sanders (1), where, to an action on the case for laying logs in the highway, and thereby straitening it, to plaintiff's damage, the defendant \*pleaded a custom for all the inhabitants of the town of Coggeshall, having ancient houses, to lay logs in waste places of the way before their doors for fuel, leaving sufficient passage for chariots, horsemen and footmen; but this Court held "that the prescription to make a nuisance is not good."

[ \*405 |

(Patteson, J.: That is not quite the same as a custom for all the liege subjects, being victuallers, to exercise certain rights in a fair.)

Gunning, contrà:

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This is a claim of right for the benefit of the public, not a prescription in favour of individuals, as in the case just cited. The custom is for the purpose of bringing essential commodities to a fair; and every subject of the realm, exercising the trade of a victualler, may take advantage of it. The argument on the other side would prevent any fair or market being held on the highway, unless shown to have existed before the highway.

(LORD DENMAN, Ch. J.: Supposing the custom good, should not you have pleaded that the *locus in quo* was not a highway at the time of the trespass, by reason of your having erected the booth?)

That would have been wrong. The place continued a highway. Perhaps, if the plaintiff had been desired, after a time, to remove his booth, he might have been liable for not doing so. But, if he had been indicted for placing his booth on the highway at the time in question, and had shown that the *locus in quo* was so used at particular times (of which this was one), according to the averments in the present replication, he could not have been convicted. The public cannot claim to have any highway entirely clear at all moments. A carriage may stand still on \*the highway.

[ \*406 ]

(PATTESON, J.: It is there for the purpose of passage: and if it remained for an unreasonable time it would be a nuisance.)

ELWOOD BULLOCK. The plaintiff here could not have directly traversed the allegation that this was a highway, or that he obstructed it, without being defeated. The present replication is the only one which would not have been either argumentative or no defence. As to the custom, the case is like Tyson v. Smith (1).

(PATTESON, J.: In that case the right to hold a fair was not contested. Here, the fair itself is said to be illegal, because the place is one over which there is a right of way. The market at Norwich is held in such a place.)

There is nothing here to show that the fair was not at least coeval with the highway; and, if so, the right of way may well have been subject to the holding of a fair, as the Court considered the right of passage to have been granted subject to toll in Lord Pelham v. Pickersgill (2).

W. H. Watson, in reply, [cited Rex v. Starkey (3)].

Cur. adr. rult.

[ 407 ] LORD DENMAN, Ch. J., in this vacation (June 27th), delivered the judgment of the Court:

> To an action of trespass for seizing and taking away the plaintiff's booth, the defendant pleaded a bye-law made for the suppression of nuisances by the Mayor and Corporation of Bury St. Edmund's, which we thought bad for reasons given on the argument: another plea, justifying the removal by alleging that the booth incumbered the highway, and which was worded as follows.

> "Defendant saith that, long before and at the said time when &c., there was, and of right ought to have been, a certain common and public Queen's highway into, through, over and along the said close called the Angel Hill," "for all the liege subjects of our lady the Queen to go, return, pass and repass on foot, and with horses and other cattle, and carriages, at all times of the year at their free will and pleasure; and that the said booth and the said goods and chattels in the said declaration mentioned, just before the said time when &c., had been respectively wrongfully erected, put up and placed, and were, at the said time when &c., respectively wrongfully standing, erected, being and remaining in and across the said highway, and stopping up and obstructing the same, so that,

<sup>(1) 6</sup> Ad. & El. 745; S. C. in Exch. Ch., 48 R. R. 539 (9 Ad. & El.

<sup>(2) 1</sup> R. R. 348 (1 T. R. 660).

<sup>(3) 45</sup> R. R. 678 (7 Ad. & EL 95). 406)

without removing the said \*obstructions and committing the said supposed trespasses, the liege subjects of our said lady the Queen could not then pass and repass in and along the said highway as "&c.: wherefore defendant, "having occasion to use the said highway," "in order to remove the said obstructions and to open the said highway, broke and entered the said booth and seized and took the said goods and chattels," took down the booth, carried away the materials, &c.

ELWOOD v. BULLOCK. [\*408]

The replication to this plea stated that the locus in quo had been immemorially, and was, situate within the borough of Bury St. Edmund's, within which there was an immemorial fair holden for three weeks on the locus in quo, that is on certain parts thereof used for that purpose, but leaving, and so as to leave, open, unobstructed and unincumbered a sufficient part of the said close, and also of the said highway, for the Queen's subjects, with their horses, carts and carriages, to go, return, pass and repass in and along the same as in the said plea mentioned. It then stated a custom for every victualler to enter upon any of the said parts of the locus in quo, but leaving as aforesaid, and, for the more conveniently carrying on their trade during the fair, to erect a booth and keep goods there till the fair was ended, paying to the owners of the soil a reasonable compensation for the use thereof. And he justified the obstruction of the highway under that custom.

There was a special demurrer: and the defendant objected that the replication was incongruous and inconsistent in admitting the right of road and stating it to be immemorial and to exist at all times of the year, and yet claiming a right to obstruct it in certain parts \*during the fair. The proper method of justifying under the custom was said to be by denying that the right of road existed at all times of the year over those parts which have been used for erection of booths and sale of goods.

[ \*409 ]

It is material to observe the manner in which, from the above abstract, the public highway is claimed. It is stated to be a highway "into, through, over and along the said close called the Angel Hill," that is, over the said close and every part of it. And such claim, as is well known, may well exist in point of law; as, for instance, where a highway passes through an inclosed country, it is not the formed road merely (whether of pavement, gravel or other material), but the whole space from fence to fence is the highway (1); and an obstruction in any part is equally the subject

(1) See Rex v. Wright, 37 R. R. 520 (3 B. & Ad. 681).

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of an indictment. The extent of a highway, where it passes over a common, is frequently still more indefinite to the right and left of what may be the ordinary passage. In Rex v. Lloyd (1) a narrow court, diverging from Snow Hill and joining it again after a circuitous course, wholly useless to passengers along Snow Hill except at times of extraordinary crowd and pressure, but used at such times, was held by Lord Ellenborough (and on good grounds) to be a highway, and an obstruction to it indictable. In this case, as has been observed, the right to the highway is stated to be over the close, though the passage on ordinary occasions may have been through the middle or some other portion only: and the allegation that the said booth was erected and being "in and across the said highway" would be well \*sustained by showing that the booth was in the said close called Angel Hill, without showing that it extended wholly from one side to the other, because it was wrongfully in and across the highway unless some lawful excuse for its being there be given; any interruption of the highway being otherwise unlawful. And the question is, in the first place, supposing the plaintiff to have an answer to the plea, in what manner it ought to be given, whether by a traverse of some allegation in the plea, or by introducing that answer as new matter in the replication. That he could not safely traverse the existence of a highway generally is sufficiently obvious. Nor, as we think, could he traverse the existence of a highway over the spot where the booth stood, because the precise part of the close over which sufficient passage for the public is (according to the alleged custom) to be left may vary on each occasion, and therefore the place where the booth may lawfully be placed may vary also, it not being any part of the custom, nor necessary for its validity, that the booth should be placed upon precisely the same part of the Angel Hill, or that the same portion of it should at each fair be left for passage. We are not aware that any other form of traverse was suggested.

We think, therefore, that the answer to the plea comes properly in the shape of a replication introducing the whole matter whereon it rests; and that raises the question whether that replication can be sustained, or, in other words, whether the custom therein stated be good in law.

And, upon this point, as the custom is stated to be immemorial, and is in itself reasonable, we are of opinion that it is. The present case bears no resemblance \*to some which were referred to, where

[ \*411 ]

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an obstruction to a public highway has been attempted to be justified by reason of some benefit of a private nature. existence of a fair is treated in our law books as a matter of public convenience; and the reasons for so considering it are also entirely of a public nature. If, therefore, the custom disclosed in the replication may have had a legal origin, there seems to be nothing unreasonable in it, as abridging a public right without a countervailing benefit: such benefit may be well supposed to arise from the accommodation afforded to the persons frequenting the fair. Then, as to the custom: it may well be that the Mayor, Aldermen, and Burgesses of Bury may have had the right of holding a fair (the right being claimed as immemorial) upon the locus in quo before the same became a highway; and, therefore, that the dedication thereof to the public may have been subject to a partial interruption during the continuance of the fair for a certain limited and not unreasonable time. It is not, therefore, a general and total obstruction of a public right, but a partial and limited one, both as to extent and duration, the public, during such limited obstruction, deriving, as has been already observed, a benefit which may well be considered as equivalent.

Upon the whole, we are of opinion that the replication is good, and that judgment should be for the plaintiff.

Judgment for plaintiff.

# REG. v. THE MAYOR, ALDERMEN AND BURGESSES OF STAMFORD.

(6 Q. B. 433-443; S. C. 8 Jur. 909.)

A resolution, on the reappointment of a town clerk by a corporation after stat. 5 & 6 Will. IV. c. 76(1), to increase his salary in compensation for the loss of former emoluments, is not valid unless executed under seal.

Such reappointment cannot, therefore, be proved by an entry of it in the minutes of the town council.

After a mandamus has been granted, return made, and an issue thereon tried, the Court will not quash the mandamus on grounds which were or might have been discussed on showing cause against the application for it; as, that a suggestion on which the motion was made is untrue.

A mandamus for compensation, under stat. 5 & 6 Will. IV. c. 76, s. 66, was moved for on the ground that the prosecutor had by the passing of the Act lost the emoluments of an office, and that, although he had since been re-appointed to another office at an increased salary, there had been no agreement between the prosecutor and the corporation that such increase should be deemed a compensation for the loss. On return, and trial of an

(1) Repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5.—A. C.

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issue bringing this fact into question, the Judge and jury declared themselves of opinion that such an agreement had existed: Held, no ground for quashing the mandamus.

The mandamus required the corporation, by its corporate style, to assess compensation (instead of requiring the council to assess compensation, and the corporation to execute a bond). After return, and issue in fact tried.

Held, that, assuming the writ to be materially defective in form, the Court ought not to quash it on motion.

WADDINGTON, in Michaelmas Term, 1842, obtained a rule calling upon the Mayor, Aldermen and Burgesses of the borough of Stamford in Lincolnshire to show cause why a mandamus should not issue, commanding them to assess the amount of compensation to be paid to James Torkington, gentleman, for the loss of the salary, fees, emoluments, &c. of the office of clerk to the justices of the said borough. The motion was made on the affidavit of Mr. Torkington, stating that, before and until the passing of stat. 5 & 6 Will, IV, c. 76, he held the offices of town clerk and clerk of the peace, and the office of clerk to the justices in conjunction with that of town clerk: that he was re-appointed town clerk after the statute passed; but the statute (1) then rendered it illegal for him to be re-appointed clerk to the justices. That, in August, 1840, he delivered to the treasurer of the borough (he himself being the town clerk) an account of emoluments &c. of the office of clerk to the justices, in respect of which he claimed \*compensation; that such claim was taken into consideration at a meeting of the town council, January 19th, 1841, and by them rejected: and that he appealed to the Lords of the Treasury, but they declined interfering, being advised that they had not jurisdiction where compensation was wholly refused, but only where there was a dispute on That "it has been suggested by the town the amount awarded. council of the said borough, as a reason for rejecting his said claim, that he has already received compensation for the loss of his office by an increase of his salary as town clerk; but deponent denies that there was any agreement, direct or indirect, express or implied, between himself and the town council, or any understanding on his part, that such increase of his salary as town clerk was to be deemed a compensation for the loss of his said office of clerk to the justices, or for any part thereof, or that the acceptance of the said increased salary was in any way to preclude him from applying for such compensation." That the increased salary was no more than a sufficient remuneration for the duties to be performed by the

[ \*434 ]

town clerk after the passing of the Act, without taking into consideration the loss of former emoluments; and that such increased salary was accepted by the deponent, and, as he believed, proposed by the council, as a remuneration for his future services, and without reference to any other consideration.

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Affidavits were made in answer, stating that, at the time of Torkington's re-appointment, no agreement was made respecting his salary as town clerk and clerk of the peace; but that, shortly afterwards, the subject was discussed at a meeting of the town council, and his salary as town clerk and clerk of the peace, which had \*been only 4l. a year, was raised to 100l. at his own suggestion; which "was expressly agreed to by the town council in consequence of the loss Mr. Torkington had sustained in being deprived of his office of clerk to the justices and other profits under the corporation" which he had enjoyed before the passing of the statute. The rule for a mandamus was made absolute.

[ \*485 ]

The writ issued, directed to the Mayor, Aldermen and Burgesses, and reciting, among other things, that Torkington made his claim to the town council, who disallowed it, and that he, "being dissatisfied with such determination of the council of the said borough, did require you the said Mayor, Aldermen and Burgesses of the said borough to re-consider your determination, and to assess to him an adequate compensation for the loss of his said office of clerk to the justices," and to secure to him such compensation by bond under the common seal of the borough &c.; but that the Mayor &c. refused to assess compensation and execute such bond. The writ, therefore, commanded the Mayor, Aldermen and Burgesses to assess the compensation &c., and secure the amount by a bond &c.

The return stated that, before 1st January, 1836, the prosecutor's salary as town clerk and clerk of the peace was 4l. per annum; "but that, upon the 4th day of October, A.D. 1836, it was agreed between and by us, the Mayor, Aldermen and Burgesses of the borough of Stamford, and the said James Torkington that the salary of him the said J. T. as town clerk and clerk of the peace should be raised from the said sum of 4l. per annum up to 100l. per annum, to commence retrospectively from the 1st day of January, A.D. 1836; which \*increase of salary was so agreed upon, and the said J. T. then expressly accepted the same, as an absolute pecuniary compensation for his aforesaid loss of his said office of clerk to the justices and for all other losses which he had

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REG. v. Mayor of Stampord. incurred or might incur by the operation of the statute." That the prosecutor had been paid the said salary of 100l. from 1st January, 1886, to the present time, and never made, or intimated the intention of making, any further claim till August, 1840, when he preferred a claim to the Mayor, Aldermen and Burgesses for compensation for the loss of his said office: and that they, on 19th January, 1841, took the claim into consideration, and rejected it, because, on 4th October, it had been agreed &c." (as before stated in the return).

The prosecutor traversed the return, alleging that the said increase of salary was not agreed upon, nor did he expressly accept the same, as an absolute pecuniary compensation for his aforesaid loss &c., and for all other &c., in manner and form &c. Issue was joined on this traverse.

On the trial, before Lord Abinger, C. B., at the Lincoln Summer Assizes, 1843, the defendants began, and called witnesses, who stated the re-election of Mr. Torkington as town clerk and clerk of the peace after the passing of stat. 5 & 6 Will. IV. c. 76: that the amount of his future salary was then discussed between him and the town council, and fixed at 100l. a year; that he, on that occasion, required that his loss of the clerkship to the justices should be considered in the amount of salary to be allowed, and it was considered accordingly; and that Torkington received the salary during five years, without making any further claim. Minutes of the council were then read, containing a resolution (1) \*that a salary of 100l. per annum should be allowed; but no agreement or other document under seal was produced. The LORD CHIEF BARON left it to the jury to say, whether, at the time of the discussion with the town council, Torkington included in his estimate the loss of his employment as clerk to the justices, and whether there was a parol agreement between him and the corporation that 100l. a year should cover all his losses: but his Lordship gave leave to move to enter a verdict for the Crown if this Court should be of opinion that the corporation could not be bound by such an agreement unless it were under seal; or that the agreement stated in the return was not made out by sufficient legal evidence. The jury stated their unanimous opinion to be that there was an

(1) The form was as follows. "4th October, 1836. Adjourned quarterly meeting. Proposed by Mr. Weldon, and seconded by Mr. Rowe, that Mr.

Torkington be allowed a salary of 100*l*, per annum for general business, agreeable to the following particulars." (which were then set forth).

[ \*437 ]

agreement to the effect before mentioned; and the learned Judge said he had no doubt that there was such an agreement, though it had not been put into form. Verdict for defendants.

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[ \*438 ]

Humfrey, in the ensuing Term, moved, according to leave reserved, for a rule to show cause why a verdict should not be entered for the Crown, unless the facts should in the meantime be stated in a special case for the opinion of the Court.

Hill, in the same Term, moved for a rule to show cause why the mandamus should not be quashed, on the ground that, in moving for the writ, the prosecutor \*had relied upon affidavits stating that he had never received compensation for the office of clerk to the justices, and, there being a conflict of depositions on this point, the Court had granted a mandamus; but it now appeared by the special finding of the jury, in which the Judge concurred, that he had, by agreement, received such compensation, and therefore the supposed ground of application did not exist. Rules nisi were granted; and in last Easter vacation(1) cause was shown against each rule.

Hill, Whitehurst and A. J. Stephens for the defendants:

As to the seal. If anything was incomplete in the formation of the agreement, the prosecutor must be taken to have waived it; for he was the legal adviser of the corporation, and ought to have enforced the observance of all necessary forms for his own benefit. Both parties showed their adoption of the contract by acting on it; and the corporation, having so acted, is bound: De Grave v. Mayor, &c. of Monmouth (2). A corporation may hire a servant without an agreement under seal; if so, they may continue him in like manner. A corporation may transact its internal affairs without execution of instruments under seal: 1 Kyd on Corporations, 449, 450; Rex v. Chalke (3); Rex v. Mayor of Ripon (4). They may contract by parol for letting a market: 6 Vin. Abr. 292, tit. Corporations (K) pl. 41. "The agreement of the major part of a corporation being entered in the corporation books, though not under the corporate seal, will be decreed in equity: Maxwell v.

[ \*439 ]

<sup>(1)</sup> May 9th. Before Lord Denman, Ch. J., Patteson and Williams, JJ. Coleridge, J. was in Court during the latter part only of the argument.

<sup>(2) 4</sup> Car. & P. 111.

<sup>(3) 1</sup> Ld. Ray. 225.

<sup>(4) 1</sup> Ld. Ray. 563.

REG. t. MAYOR OF STAMFORD. Dulwich College" (1), Marshall v. Corporation of Queenborough (2). Here, if the parol agreement was in itself obligatory on the corporation, it cannot be argued that the contract did not bind the prosecutor for want of mutuality; but, assuming that the agreement was informal, still, if the corporation have so acted upon it as to be bound by way of estoppel, that answers the objection as to mutuality, according to the judgment of the Court of Common Pleas in The Fishmongers' Company v. Robertson (3).

(Patteson, J.: The corporation could not act upon the agreement, nor be proper parties to it, though the return is framed as if they were. Under stat. 5 & 6 Will. IV. c. 76, s. 66, the council agree upon and assess the compensation for loss of an office, and then it is secured by the bond of the corporation.)

The adoption of the agreement makes it their act. They pay the salary.

(PATTESON, J.: They had no right to pay it. If they so acted on the agreement, their acting was void.)

The salary comes out of the corporation funds.

(Patteson, J.: It comes out of the borough fund; the corporation could not be sued for it: Jones v. Mayor of Carmarthen (4); though the bond, by the express direction of sect. 67, is given under the corporation seal. If the salary here was a compensation, it ought to have been determined upon by the council.)

Further, the traverse of the return does not, by its terms, deny that an agreement was made, but only avers that the prosecutor [\*440] did not thereby \*accept an increase of salary as compensation for the loss of his clerkship to the justices.

(They contended also that the minute of council, with the other evidence, sufficiently proved the agreement relied upon by the defendants, and that evidence beyond the minute itself was admissible, as showing the consideration on which the salary was granted. But on these points no decision was given: the argument, therefore, is not further stated.)

- (1) 1 Fonbl. on Equity, 306, note (o) (5th ed.).
- (2) 24 R. R. 220 (1 Sim. & St. 520). The opinion is there given on the supposition that expense had been

incurred on the faith of a resolution to grant part of the corporation property.

- (3) 63 R. R. 242, 271, 275 (5 Man. & G. 131, 191, 196).
  - (4) 58 R. R. 826 (8 M. & W. 605).

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The return is altogether erroneous, for the reason already pointed out.

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(Patteson, J.: The mandamus is wrong too. It states that the prosecutor, being dissatisfied with the order of the town council, requested the corporation to reconsider it; and the mandamus is directed to the corporation.)

The corporation has made a return to the mandamus so framed.

(The Court then directed them to show cause against the rule for quashing the mandamus.)

If the motion to enter a verdict for the Crown is substantially right, the rule to quash the writ will, of course, not be made absolute. The *mandamus* is rightly directed; the practice, in cases of this kind, is to call upon the corporation.

(PATIESON, J.: Only to execute and deliver a bond.)

In Reg. v. The Corporation of Warwick (1) the mandamus was to assess compensation. As to the finding at the trial, the Court will not quash a mandamus on a mere allegation of facts; the facts, too, being only such as were or might have been shown to the Court as cause for not granting the writ. The defendants ought to have stated on their return the proceedings of the town council; then the prosecutor \*would have been prepared with evidence in answer, which he was not, concluding that the minute of the council could not be relied on as showing an agreement.

[ \*441 ]

(PATTESON, J.: I think the mandamus ought to have gone to the town council; then, probably, the point would have been tried.)

As it is, a specific issue has been taken and tried.

(LORD DENMAN, Ch. J.: At present, we must take the mandamus to be right. When a peremptory mandamus is moved for, we may enquire into this point. According to the old law, when part of a corporation was bound to do a thing, the mandamus went to the corporation.

Whitehurst and A. J. Stephens, as to the motion to quash:

It is shown, by the decision of a jury, that an agreement existed, such, at least, as a court of equity would carry into effect. Had

(1) 50 B. B. 454 (10 Ad. & El. 386).

Reg. r. Mayor of Stamford. this Court been satisfied that such was the case when the rule for a mandamus was under discussion, a mandamus would not have been granted; for it rests in the discretion of the Court to direct that a mandamus may issue, or to forbear ordering it, as they may deem best for the advancement of justice: Rex v. The Paddington Vestry (1), and the cases there cited.

LORD DENMAN, Ch. J.:

This application is made on the ground that the prosecutor deceived the Court when the mandamus was obtained. I think we have no right to quash the writ on that ground. No case is cited in which the Court has quashed a mandamus on grounds which might have been shown against making the rule for a mandamus absolute.

[442] PATTESON and WILLIAMS, JJ. concurred.

Rule for quashing the mandamus discharged.

On the other point,

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This was a mandamus to give compensation (which the defendants had disallowed on considering the claim) to the late clerk to the justices of the peace of the borough of Stamford, from which office he had been removed without misconduct. The return bore that he had already received compensation; particularly setting forth that it was agreed, in October, 1836, between the prosecutor and the defendants, that his salary in respect to the offices of town clerk and clerk of the peace should be raised from 4l. to 100l., commencing from the preceding 1st January; and that the prosecutor expressly accepted the same as a pecuniary compensation for his aforesaid loss of his said office of clerk to the justices of the peace, and for all other losses which he had incurred or might incur by the operation of the statute 5 & 6 Will. IV. c. 76; with an averment that the increased salary had been regularly paid, and the prosecutor never intimated a wish for any further compensation till August, 1840. The prosecutor traversed the return, alleging that the said increase of salary "was not agreed upon, nor did he expressly accept the same, as an absolute pecuniary compensation, &c."

On the trial, before Lord Abinger at Lincoln, it was proved that, at a corporate meeting, the agreement set forth was verbally made:

and the sole question was, whether such agreement could by law be so made.

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On the authority of several cases, particularly that of Arnold v. The Mayor of Poole (1), we are of opinion that it could not: that the agreement could not bind without being sealed; and that the question as to a valid and binding agreement having been entered into was raised by the issue; consequently, that the verdict, according to leave reserved, must be entered for the Crown.

Rule absolute to enter verdict for the Crown.

## HARRIOT DAVIES v. GEORGE CROFT VERNON.

(6 Q. B. 443-451; S. C. 14 L. J. Q. B. 30; 8 Jur. 871.)

1844. July 6.

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By marriage settlement, lands were settled on the husband for life, with a joint power of appointment in the husband and wife. They mortgaged the land, with all title deeds, to A. for a term, and delivered the deeds to him. M. D. paid off the mortgage; and took an assignment of the premises from A., the first mortgagee, but without mention of title deeds, and M. D. never demanded them. A. afterwards gave up the deeds to the husband; and he deposited them with the defendants, solicitors, as collateral security for mortgage money which he owed their client. Afterwards, the husband and wife mortgaged the settled lands in fee, subject to the term, without mention of title deeds; and they executed the power of appointment by giving a like power to the wife alone. The husband died; and the wife appointed to herself in fee. She then offered defendants to pay the debt due from her late husband to their client, on receiving back the title deeds, denying, however, that she was liable for such payment; but the defendants refused to deliver them unless they were paid also their own charges for business done for their client in respect of the mortgage to him.

In trover by the wife against defendants for the deeds, Held

1. That the delivery of the deeds by A. to the husband was a rightful delivery, and enured to the benefit of the husband and wife during their joint lives, and afterwards of the wife as appointee under the power.

2. That the wife was entitled to hold the deeds as against the mortgagee in fee, having an interest in them in respect of her equity of redemption, no mention being made of them in the conveyance in fee, and the deeds never having been handed over to the mortgagee in fee.

3. That, even if this were not so, the defendants could not set up the right of the mortgagee in fee.

- 4. That the action well lay against the defendants, though they held the deeds only as solicitors.
- 5. That the demand, accompanied by an offer to pay, was sufficient, though plaintiff at the same time denied her liability.
- 6. That the refusal to give up the deeds except on condition, which defendants had no right to impose, that their charges in respect of business done for their own client should be paid was evidence of a conversion.

Trover for deeds and writings, to wit an attested copy of release, &c., a certain exemplification of a recovery &c. (the declaration

(1) 61 R. R. 664 (4 Man. & G. 860).

DAVIES v. VERNON. [ \*444 ] described the several instruments \*by the dates and parties). Pleas. 1. Not guilty. 2. Plaintiff not possessed. Issues thereon.

On the trial, before Wightman, J., at the Worcester Spring Assizes, 1843, a verdict was taken for the plaintiff with 1,000l. damages, to be reduced to 40s. if the defendants should give up the deeds; and with leave to the defendants to move to enter a non-suit. W. J. Alexander, in Easter Term, 1843, obtained a rule to show cause why a nonsuit should not be entered or a new trial had.

In Hilary vacation, 1844 (1), R. V. Richards and F. V. Lee showed cause, and W. J. Alexander and J. W. Smith supported the rule. The facts of the case, the points argued, and the authorities cited, will appear sufficiently from the judgment of the Court and the notes subjoined.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This was an action of trover for the recovery of the title deeds of an estate. The pleas were: 1. Not guilty. 2. That plaintiff was not possessed. The facts at the trial appeared to be as follows.

In August, 1810, a deed of settlement was executed upon the marriage of the plaintiff with her husband, since deceased. By the settlement, the estate in question, with others, was settled on the husband for life, with a joint power of appointment in the husband and wife. On the 8th April, 1830, the husband and wife mortgaged the estate to one Allen for 1,000 years to secure 700l.; and in that mortgage mention is made of the title \*deeds in question (2); and they were delivered over to Allen. In November, 1830, Allen assigned the term to Mary Davies, daughter of the plaintiff (3). In that assignment no mention is made of the title deeds. In September, 1832, Mary Davies assigned the term to John Jobson the elder: no mention is made of the assignment of the title deeds.

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- (1) February 9th. Before Lord Denman, Ch. J., Patteson and Wightman, JJ.
- (2) They appointed, and also granted, bargained, sold and confirmed, to Allen, his executors, &c., a messuage or tenement, and several parcels of land, called &c., together with all houses, outhouses, &c., to the said hereditaments belonging &c., and the reversion &c., and all such deeds, writings and muniments of title whatsoever, relating to or in anywise concerning the same messuage &c., as are
- now in the custody, possession or power of the said Edward Davies and Harriot his wife, or either of them. and they, he or she can or may procure without suit at law or in equity. To hold &c.
- (3) Mary Davies having paid of Allen's mortgage. Edward Davies and his wife were parties to the assignment, and appointed &c. to Mary Davies. And they joined in like manner in the next mentioned deed of September, 1832.

The deeds were given up by Allen to the husband (Davies) some time in 1831, and were by him deposited in that year with the defendants, the solicitors of a Mr. Edward Vernon, as a collateral security for money charged on an estate of his own. By lease and release of 6th and 7th March, 1833 (1), the premises were mortgaged in fee to Thomas Jobson. No mention of the title deeds is made in that conveyance.

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In 1834 the husband wished to borrow more money: and the plaintiff at first assented, but afterwards refused to execute any further deed. In 1838 the power contained in the settlement was executed by the husband and wife giving a power of appointment to the survivor. In 1842 the husband died; and the plaintiff appointed to herself in fee. A demand was afterwards made by the plaintiff upon the defendants for the deeds.

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The plaintiff had a verdict, leave being reserved to enter a nonsuit. A rule nisi having been obtained, three questions were raised on the argument.

1. Whether the plaintiff is shown to be entitled to the possession of the deeds. 2. Whether the defendants are the proper parties to the action, or it should have been brought against their principal, Edward Vernon. 3. Whether there was sufficient evidence of a conversion.

With respect to the first question, the mortgage for 1,000 years in 1830 was a good execution of the power contained in the marriage settlement; and, as the deeds in question are mentioned in that mortgage, and even delivered to Allen the mortgagee, he certainly was entitled to hold them against both the husband and wife. It appears, however, that, when Allen assigned the term to Mary Davies, he did not, in that assignment, mention, or give up to her, these deeds; and, if he had had any interest in the estate independent of that mortgage term, he might legally have withholden them from Mary Davies, according to the case of Yea v. Field (2). But Allen had no such interest, and would therefore have been bound to give up the deeds to Mary Davies, and she to John Jobson the elder, upon assigning the term to him, if they had been required. It does not appear that they were required; and in point of fact

Westland, 30 R. R. 765 (1 Y. & J. 117), 2 Sugd. Vend. & Purch. 105, c. ix., s. iv. 42, 43, 10th ed., 2 Prest. Conveyancing, 466, 2nd ed., 2 Pow. Mortg. 642, c. xiv. note (T).

<sup>(1)</sup> Between E. Davies and his wife of the first part, John Jobson of the second part, and Thomas Jobson of the third part; subject to the term.

<sup>(2) 1</sup> R. R. 603 (2 T. R. 708). To this point were also cited Wiseman v.

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they were given up to Davies the husband. It is said that this \*was not a giving them up to the husband and wife, but to the husband only: but we are of opinion that, as the husband and wife were the mortgagors, being joint appointors of the term, and as the husband was tenant for life of the estate, the giving up the deeds to him accrued to the benefit both of himself and his wife, and that he was entitled to hold them for his life, and that on his death they would belong to the person to whom he and his wife should have appointed the fee under the power. That would, in this case, be to the plaintiff herself, by virtue of their joint appointment in 1838, and of her appointment after his death in 1842, unless Thomas Jobson be entitled to them under the lease and release of March, 1833.

Now that conveyance in 1833 is silent as to the deeds; and, though it be a mortgage in fee, vet, if the deeds remained with the mortgagors, they might lawfully retain them in respect of their equity of redemption as against the mortgagee. At any rate, a stranger cannot set up the right of the mortgagee who has never asserted it himself, and whose mortgage contains no mention of the deeds (1).

Further, it appears that the deeds were deposited with the defendants by the husband, who was then tenant for life; they had therefore good right to hold them during his life, and during his life only, and were then bound to give them up to the person

lawfully entitled (2). We have shown that the plaintiff is that person, \*as against John Jobson the assignee of the term, and as against Thomas Jobson the mortgagee in fee, because neither of them had any covenant entitling him to the possession; much less can any mere strangers, as the defendants now are, set up any supposed claim of either of the Jobsons. The second question is whether the defendants are the proper

parties to this action. The general rule is, that an agent is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal: Perkins v. Smith (3). Stephens v. Badcock (4), which was cited, does not at all apply. That was an action for money had and received, and required a privity between the parties, which is quite unnecessary in an action

<sup>(1)</sup> As to setting up jus tertii, Leake v. Loveday, 61 R. R. 707 (4 Man. & G. 972), was cited for the defendants.

<sup>(2)</sup> On this part of the case Owen v. Knight, 44 R. R. 649 (4 Bing. N. C. 54), and Philips v. Robinson, 29 R. R.

<sup>518 (4</sup> Bing. 106), were cited in support of the rule.

<sup>(3) 1</sup> Wils. 328.

<sup>(4) 37</sup> R. R. 448 (3 B. & Ad. 354,.. See Bamford v. Shuttleworth, 52 R. L. 542 (11 Ad. & El. 926).

of trover. Neither does the case of *Mires* v. *Solebay* (1) govern the present: for there the defendant was a servant only, and, when the demand was made upon him, was not in possession of the sheep demanded: and, again, there was a special verdict which did not find the conversion, but only the demand and refusal, which was held to be evidence only. Here the defendants originally received the deeds in question, and were in possession of them at the time of the demand. The case of *Cranch* v. *White* (2) is much more in point, and is an authority to show that this action will lie against the defendants.

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The last question is, whether there be sufficient evidence \*of a conversion. Now the defendants, by their letter, refuse to deliver up the deeds unless upon a certain condition, which they had no right to impose (3): \*that is tantamount to an absolute refusal.

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(1) 2 Mod. 242. Lane v. Cotton, 12 Mod. 472, 488, was also cited for the defendants, as showing that a person acting only as agent was not liable for a mere non-feasurce.

- (2) 41 R. R. 616 (1 Bing. N. C. 414).
- (3) The following, among other letters, were proved at the trial.

From Messrs. Jones & Co., plaintiff's solicitors in the country, to defendants, October 19th, 1842.

"Mrs. Davies has instructed us to raise money by mortgage of a certain portion of her estates, a sum sufficient to discharge the existing mortgages upon all parts of her property, and procure reconveyances thereof, and obtain possession of all her title deeds. That done, she gives us to understand that it is her intention, by sale of a part of the Penthryn estate, to discharge the debts of her late husband, or such portion thereof as upon examination will appear to her to be fair and just. Amongst the claims which she has instructed us to discharge at once out of the mortgage, is intended that of your client Mr. Vernon; and we are now prepared to pay it, on receiving from you all the deeds and documents affecting her estate, in your or his custody. respect to your claim upon the late Mr. Davies, she informs us that she never saw any particulars of it, and hath requested us to ask you to send

us a full statement thereof for her examination. Yours." &c.

From defendants to plaintiff's solicitors in the country, October 21st, 1842.

"Before we part with any deeds in our possession, the whole demand upon them must be paid. This will, of course, comprise not only Mr. Vernon's mortgage, but our and Mr. Minshall's claim. You have had a statement of both of these." (This statement comprised the professional charges of defendants for business done on behalf of Mr. Vernon in respect of the mortgage; and also a cash account stated in Davies's lifetime between him and Minshall individually.) "Mr. Jones, when at Bromsgrove, saw a statement of account signed by Mr. Davies, and he also saw the draft mortgage from Mr. Davies to Mr. Minshall, approved and signed by Mr. Davies before it was engrossed. This mortgage, with the subsequent interest upon it, and the payment made by Mr. Minshall to Mr. Smith of the 'Golden Cross Hotel' in this town, and the interest upon that payment, will form, as appears by the account sent you, our demand." . . . "We shall be ready at any time to deliver up all deeds and documents in our possession, on payment of what is due to Mr. Vernon on his mortgage, and to ourselves or to Mr. Minshall. Yours,"&c.

From plaintiff's solicitors in Lon-

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[ \*450, %. ]

And this is not like the case of Alexander v. Southey (1); for there the defendant, being a servant only, said that he could not deliver up the goods without the order of his masters; and it was held not to be a conversion. But here the defendants are not mere servants: they are the professional agents of Mr. Edward Vernon, the persons who originally received the deeds; and they do not in their refusal put it on the ground that they must act \*under the orders of their principal, but, being in possession of the deeds, attempt to annex a condition to the delivery of them which they had no right to annex (2).

Upon the whole, therefore, we are of opinion that the plaintiff was entitled to recover as against these defendants, and that the rule which has been obtained must be discharged.

Rule discharged.

don to defendants, November 30th, 1842.

"We have received instructions from Mrs. Harriot Davies, now in London, to pay (without prejudice to her rights, and without admitting \*any obligation on her part to do so) the residue of principal and interest due to your client Mr. Edward Vernon, upon having delivered up to us the deeds and documents belonging to her, and enumerated in the two receipts given by you to the late Mr. Davies in 1831 (except such of them as you have since given up). We beg to request the favour of an explicit answer, whether you are prepared to deliver up the deeds upon such payment, or still insist upon holding them upon any further alleged lien, as, in default of the deeds being given up, we are instructed at once to commence proceedings against you, for Mrs. Davies is in want of her deeds. Yours," &c.

From defendants to plaintiff's solicitors in London, December 23rd, 1842, after some intermediate letters of no importance here.

"We shall certainly object to any deeds being delivered up on the terms contained in your letter. Our agent, Mr. Benbow, will appear to any writ which Mrs. Davies may issue against us. Yours." &c.

(1) 24 R. R. 348 (5 B. & Ald. 247). It was argued, for the defendant, that the demand of the deeds was not sufficient to maintain this action, because the offer to pay, which accompanied the demand, was qualified (selecters of 19th October and 30th November, 1842), and therefore not sufficient to discharge a lien. Besides Alexander v. Southey, J. W. Smile cited Green v. Dunn,† Strong v. Harvey,‡ Cheminant v. Thornton.) Sutton v. Hawkins.

(PATTESON, J.: I do not see any qualification here; it was only at exclusion of her liability. What did the admission of it signify to them. if they got the money?

WIGHTMAN, J.: She merely says. I am not obliged to pay, but I will.

LORD DENMAN, Ch. J.: Is a person who makes a tender bound to admit that he is liable for what he tenders?

Mynn v. Joliffe ¶ was also cited for the defendants in this part of the argument, as showing that it was no part of the defendants' duty as solicitors to receive payment of the mortgage money.

(2) See Wakefield v. Newbon, aule. p. 379.

<sup>† 3</sup> Camp. 215.

<sup>1 3</sup> Bing. 304.

<sup>§ 2</sup> Car. & P. 50.

<sup>| 8</sup> Car. & P. 259.

<sup>¶ 42</sup> R. R. 802 (1 Moo. & Rob. 326).

#### GOODALL v. LOWNDES.

(6 Q. B. 464-467; S. C. 9 Jur. 177.)

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Guardians of a poor law union indicted plaintiff for disobeying an order of Sessions for maintenance of a bastard. Before trial, plaintiff offered a compromise; and the clerk to the guardians, on their behalf, agreed with him for a sum, on account of costs and maintenance, which he paid; and the indictment was dropped. Afterwards, plaintiff discovered that the order of Sessions was defective and void; and he brought assumpsit against the clerk for money had and received.

Held, that the clerk was not liable, having done nothing in the prosecu-

tion beyond preferring the indictment.

And that, if the compromise was illegal, plaintiff being in pari delicto with the other parties offending, could not sue them for money which he had paid.

Assumpsit for money had and received, and on an account stated. Plea, Non assumpsit.

On the trial, before Tindal, Ch. J., at the last Staffordshire Assizes, the material facts appeared to be as follows.

The guardians of the Wolstanton and Burslem union and the overseers of the parish of Wolstanton, in Staffordshire, applied at Petty Sessions for an order of maintenance against the plaintiff as the father of a bastard child then chargeable to the said parish. Plaintiff entered into recognizance, under stat. 2 & 3 Vict. c. 85, s. 3 (1), and removed the case to the Quarter Sessions, where an order was made, finding him to be the father, and ordering him to pay 2s. a week for maintenance, and 26l. 18s. 10d. to the said guardians and overseers for costs. Plaintiff refused payment; the \*guardians preferred an indictment against him at the Sessions for misdemeanour in disobeying the order: and the grand jury found a true bill. Plaintiff removed the indictment into this Court by certiorari: but, before the time for trial, he sent his attorney to the board of guardians to arrange a settlement. The attorney appeared at a meeting of the board as plaintiff's representative; he there saw the defendant, the clerk to the guardians, and agreed to pay 80l. for costs, on the indictment being discontinued. He gave defendant a cheque for 80l. 9s. 10d.; and defendant gave a memorandum that he had received 26l. 13s. 10d., costs awarded by the Quarter Sessions, 31. 16s. for maintenance, and 50l. towards costs of the indictment. which was not further prosecuted. Afterwards it was discovered that the order of Quarter Sessions had defects on the face of it which, as was alleged on the plaintiff's part, made it wholly invalid; and the plaintiff's attorney represented this to the defendant, and

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<sup>(1)</sup> Repealed by S. L. R. Act (No. 2), 1874.—A. C.

GOODALL c. LOWNDES. asked him to repay the 80l. 9s. 10d. The defendant suggested that the attorney should write to him in his capacity of clerk to the board of guardians; and, in answer to a letter so written, stated that the board declined to entertain the question.

At the trial, the defendant's counsel urged that this action did not lie against a party who had acted merely as clerk to the guardians; and the Lord Chief Justice observed that, besides this difficulty, there was no duress proved, the plaintiff having voluntarily sent his attorney to make the compromise; and that a man might, if he chose, pay money under an invalid order, particularly where he was bound morally to make the payment: and his Lordship added that he was not prepared to say that compounding a misdemeanour was in all cases an illegal \*act. The plaintiff was nonsuited, but leave given to move to enter a verdict for the amount claimed.

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### Whateley now moved accordingly (1):

Unwin v. Leaper (2) shows that money extorted by the threat of process under a penal law may be recovered in an action for money had and received. This case is the same in principle with Townson v. Wilson (3), where a party, having paid money to overseers, under duress, to indemnify them for future charges of a bastard, was held entitled to recover it back in this form of action. Chappell v. Poles (4) is a similar case. And the compromise here was unlawful according to the rule laid down by this Court in Keir v. Leeman (5) the object being to stifle a prosecution for an offence of a public nature.

(LORD DENMAN, Ch. J.: The difference between that case and this is, that the money here has actually been paid.)

That the defendant here received the payment as an agent only, is immaterial: in *Townson* v. *Wilson* (3) and *Chappell* v. *Poles* (4) the defendants had gone out of office, and paid over the money, before action brought. The receipt as agent, and payment over to the principal, was also held to be no answer in *Miller* v. *Aris* (6). If any thing here discharges the defendant from liability, it would seem, by an observation of Parke, B. in *Chappell* v. *Poles* (4), that

<sup>(1)</sup> Before Lord Denman, Ch. J., Williams, Coleridge and Wightman, JJ.

<sup>(2) 56</sup> R. R. 522 (1 Man. & G. 747).

<sup>(3) 1</sup> Camp. 396.

<sup>(4) 46</sup> R. R. 779 (2 M. & W. 867).

<sup>(5)</sup> Ante, p. 308.

<sup>(6) 1</sup> Selw. N. P. 103, 11th ed. See the authorities cited in Wakefield v. Newbon, ante, p. 379, and in Davis v. Vernon, ante, p. 457.

he ought to have pleaded it. It was said on the trial, that the payment could not be compulsory, because the plaintiff sent his attorney and made the compromise of his own accord. But he did it under \*coercion. And, if the money was obtained in enforcement of an illegal compact, it is no matter whether the very act of paying was voluntary or not. In Feltham v. Terry (1) an overseer of the poor levied money on an illegal conviction, which was afterwards quashed; and it was held that the convicted party might waive the tort and bring assumpsit for money had and received against the overseer for the clear sum in his hands. The order of Quarter Sessions, as framed, was a nullity.

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r.

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(LORD DENMAN, Ch. J.: We propose to take that for granted at present.)

The exacting so large a sum was a gross extortion.

Cur. adv. vult.

LORD DENMAN, Ch. J., in the same Term (November 18th), delivered the judgment of the Court:

In this case the amount levied certainly seems to have been excessive; but we think that the plaintiff could not recover it back. No proceeding of the defendant's appears, beyond preferring the indictment. The facts do not prove extortion by duress, nor warrant an action against him for money had and received. And, if the transaction was wrong, the parties are in pari delicto, and one of them cannot, after voluntarily paying his money, repent and then sue the other. In Unwin v. Leaper (2), where the plaintiff had paid his money on a threat to sue him in a penal action, that was properly considered as duress; but here all was voluntary.

Rule refused.

# EX PARTE JACQUES BESSET.

16 Q. B. 481-486; S. C. 14 L. J. M. C. 17; 9 Jur. 66; 1 New Sess. Cas. 337.)

Under the Convention Act, 6 & 7 Vict. c. 75 (3), for committing and delivering up to justice, on requisition by an agent of the King of the French, persons accused of certain crimes done in France, a warrant to detain a party so accused "until he shall be discharged by due course of law" is

1844, Noc. 5.

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<sup>(1) 1</sup> T. B. 387 (cited in *Birch* v. *Wright*); S. C. 1 Cowp. 419 (cited in *Lindon* v. *Hooper*).

<sup>(3)</sup> See now Extradition Act, 1870 (33 & 34 Vict. c. 52), which repeals this Act.—A. C.

<sup>(2) 56</sup> R. R. 522 (1 Man. & G. 747).

Ex parte BESSET. insufficient; and the party imprisoned under it is entitled to his discharge on habeas corpus.

The habeus corpus for that purpose is claimable at common law.

On habeas corpus, and motion to discharge from such imprisonment for an offence committed abroad, the warrant being defective, the Court (assuming that they could look into the depositions referred to by the warrant) cannot on their own authority remand the prisoner as a person charged with a crime.

M. CHAMBERS, in this Term (November 2), moved for a habeas corpus directed to the gaoler or keeper of her Majesty's gaol or prison in Giltspur Street, in the city of London, or his deputy, commanding him to have before the Queen at Westminster, immediately &c., the body of Jacques Besset, being detained under the custody of the said gaoler, with the day and cause of his being taken and detained &c., to undergo and receive &c. The Court granted the writ: and the keeper now brought the prisoner into Court, and made return:

"That, before the said writ came to me, viz. on the 4th day of November, 1844, the said Jacques Besset was committed to my custody by virtue of a certain order or commitment the tenor whereof followeth: viz.

"To all and every the constables and other officers of the peace for the city of London and the liberties thereof, whom these may concern, and to the keeper of the Giltspur Street Prison, in London.

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"London | These are in her Majesty's name to command you and every of you forthwith safely to \*convey, and deliver into the custody of the said keeper, the body of Jacques Besset, being charged before me, one of her Majesty's justices of the peace in and for the said city and liberties, by the oaths of Philip Antoine Mathieu and others, taken and sworn in the presence and hearing of the said Jacques Besset, for that the said Jacques Besset is accused of having committed in France the crime of fraudulent bankruptey. as appears by the warrant of arrest issued by a competent Judge in France, and duly authenticated before me, and as also appears by the warrant of one of her Majesty's principal Secretaries of State requiring me to take cognizance of such crime, the said crime and the acts done being clearly set forth and proved before me by the oaths of the said Philip Antoine Mathieu and others, and by the depositions of several witnesses, taken in France, and duly proved by the said Philip Antoine Mathieu and others: whom you the said keeper are hereby required to receive, and him in your custody

safely keep until he shall be discharged by due course of law. And for your so doing this shall be to you and each of you a sufficient warrant. Given under my hand and seal this 28rd day of September, 1844.

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"WM. MAGNAY,

"Mayor of London."

"And this is the cause" &c.

The return having been read,

M. Chambers moved that the prisoner should be discharged.

E. James opposed the discharge:

First, it is proposed to show by affidavit that the party is a foreigner, and \*the circumstances under which he stands charged with crime. Such affidavits, being merely explanatory, and not contradictory to the return, may be received.

[ \*483 ]

(LORD DENMAN, Ch. J.: The Convention Act, 6 & 7 Vict. c. 75, under which the prisoner is committed, enacts (sect. 1) that, "in case requisition be duly made, pursuant to the said Convention, in the name of his Majesty the King of the French, by his ambassador" &c., "to deliver up to justice any person who, being accused of having committed" one of certain specified crimes within the French territories, shall be found within her Majesty's dominions, it shall be lawful for one of her Majesty's Secretaries of State, by his warrant to signify such requisition, and require all justices &c. to aid in apprehending such person, and committing him to gaol for the purpose of his being delivered up to justice according to the Convention, and thereupon it shall be lawful for any justice &c. to examine into the charge on oath, and, upon such evidence as would justify committing for trial if the crime of which the party is accused were committed here, "to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid." Here the commitment is "until he shall be discharged by due course of law." How do you get over that objection?)

In the first place the prisoner is not in a situation entitling him to the benefit of it. The Court will look at the depositions; and, if they see that the party is detained on charge of a crime for which Ex parte BESSET. he may be tried in another country, they will remand him to custody.

(COLERIDGE, J.: On what law or statute do you consider the prisoner's application to be founded?)

[\*484] It appears to be under \*stat. 31 Car. II. c. 2. The object of that Act is that parties charged with "criminal or supposed criminal matters" shall not be detained in prison for offences which may be tried in this country. The provision in sect. 3, that surety shall be taken for the party's appearance in the Court of King's Bench or at the next Assizes or Sessions, agrees with this construction. Stat. 56 Geo. III. c. 100, is only an extension of the former Act, and does not require any different interpretation. And in Rex v. Mackintosh (1) it was held that the statute of Charles did not apply to a person committed for treason done in Scotland.

(LORD DENMAN, Ch. J.: Why may not we consider the writ as issued at common law?)

If the Court will not act under the statute in the case of a person charged with a crime done abroad, neither will it interfere in such a case at common law.

(LORD DENMAN, Ch. J.: According to your argument, our gaolers are gaolers for France without the Convention.)

If the writ lies, the objection pointed out is not fatal to the warrant. "Discharged by due course of law" means discharged by the course pointed out in the statute, namely, by being delivered up as the enactment requires. In Ex parte Goff (2) a warrant concluding in this form was held, on habeas corpus, sufficiently certain. It is true that the warrant there (by which a collector was committed for not accounting, under stat. 25 Geo. III. c 41), recited an adjudication that the party should be committed until he should have made a true and fair account, and paid over the moneys remaining in his hands; but here, if reference be made to the Convention Act, the course by which the prisoner is to be discharged becomes equally certain.

[\*485] (Wightman, J.: \*Suppose no requisition is made under sect. 3

(1) 1 Stra. 308.

(2) 3 M. & S. 203.

of stat. 6 & 7 Vict. c. 75, for an order to deliver the party up to an agent of the King of the French.)

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At the end of two months he will be discharged, under sect. 4. In Mash's case (1) a warrant concluding "until he shall be discharged from thence, by due course of law" was held insufficient; but there the things required for the discharge were acts to be done by the prisoner himself.

(Wightman, J.: The present case is within the terms of the judgment there; that, where a man is committed for any crime, at common law or by statute, for which he is punishable by indictment, "he is to be committed, till discharged by due course of law: but, when it is in pursuance of a special authority; the terms of the commitment must be special, and exactly pursue that authority.")

Supposing the return here defective, it will be a question whether the Court will not look into the depositions on which the warrant was granted, and, if they show a crime committed, remand the prisoner.

(Wightman, J.: That could be only where a crime appeared for which trial might be in this country.

LORD DENMAN, Ch. J.: The depositions are nothing to us, unless under the statute.

COLERIDGE, J.: Does the statute give any power of this kind to us?)

It does not limit the general authority of the Court.

Sir F. Thesiger, Solicitor-General, with whom was Gurney, appeared on behalf of the Lord Mayor, but only to abide such order as the Court should make.

M. Chambers, for the prisoner, was not further heard.

# LORD DENMAN, Ch. J.:

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l regret that, on the first application which has come before us under this statute, the warrant is so defective that we cannot allow

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the Act to take effect. Neither we nor the gaoler have any power but such as the statute gives; and its provisions have not been rightly pursued. We are asked to remand the prisoner on our own authority, as charged with a crime: but we know nothing of the crime unless as it is brought before us by the warrant; or, I should rather say, we have no authority of the kind in such a case. If we could act in the manner suggested, the statute would have been unnecessary. The prisoner must be discharged.

WILLIAMS, COLERIDGE and WIGHTMAN, JJ. concurred.

#### LORD DENMAN, Ch. J.:

It is proper that it should be understood that this application is at common law. The statute, 31 Car. II. c. 2, is not necessary to the right of making it.

Prisoner discharged.

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#### WHITE v. HILL AND OTHERS.

Noc. 7. [ 487 ]

(6 Q. B. 487-492; S. C. 14 L. J. Q. B. 79; 2 Dowl. & L. 537; 9 Jur. 129.)

Where the lord of a manor has conveyed land to A., and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A. from the fact that the strip of land lies between a highway and land undisputedly comprised in the conveyance to A.

Where several defendants to an action of trespass plead Not guilty, with other pleas, and the plaintiff gives no evidence as against one of them, such defendant is not entitled, as of right, to claim his acquittal before the case for the defence is opened. And, per Lord DENMAN, Ch. J., the more ordinary practice is not to direct an acquittal till the case on both sides is closed.

The first count charged that defendants, to wit TRESPASS. on &c., with force &c., broke and entered a close of plaintiff, situate &c. (setting out abuttals north, south, east and west); and, with feet in walking, &c. The second count charged that defendants, on &c., with force &c., broke and entered another close of plaintiff, situate &c. (setting out the same abuttals, with the omission of the abuttal on the east); and then and there cut down the trees, to wit three elm trees, of plaintiff, of great value &c., then growing and being in and upon the last mentioned close, and also a certain other tree of plaintiff, of great value &c., there growing &c. (as before). The third count charged that defendants, to wit on &c., seized, took and carried away divers, to wit twelve, waggon loads of wood, ten waggon loads of timber, ten waggon loads of bushes, and four trees, of plaintiff, of great value &c., and converted &c.

WHITE E. HILL.

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Pleas. 1. Not guilty.

- 2. To the first count, that the close in which &c. was not the close of plaintiff. Issue thereon.
- 3. To the second count, that the close in which &c., and the trees, and also the other tree, in the second count mentioned, were not the close and trees of plaintiff.
- 4. To the third count, that the wood, timber, bushes and trees were not the wood, timber, bushes or trees of plaintiff.
- 5. To the first count, that the close in that count mentioned, and in which &c., at the said time when &c., were the close, soil and freehold of one Justly Hill and one William Harrison: justification by defendants as servants and by the command of the said Hill and Harrison.
- 6. To the second count, that the other tree in that count mentioned was, at the time when &c. in that count mentioned, standing, growing and being in the said close in which &c. in that count mentioned, and that, at the said time when &c., the said close in that count mentioned was the close, soil and freehold of J. Hill and W. Harrison: justification as before.

Replication. To the first, second, third and fourth pleas, similiter. To the fifth plea, that the close in the first count mentioned was not the close of J. Hill and W. Harrison. To the sixth plea, that the close in the second count mentioned was not the close of J. Hill and W. Harrison.

Rejoinder. Similiter to the replications of the fifth and sixth pleas.

On the trial, before Patteson, J., at the last Hampshire Assizes, it appeared that the plaintiff was in the occupation of certain land in the Isle of Wight, near to certain other land of which J. Hill and W. Harrison were the legal owners. In 1723 the whole of the land above mentioned had been in the ownership of a person named Popham, who was lord of a manor comprehending all. In that year, Popham demised certain part of it for a term of years; and it was shown that the land so demised had now, by renewals and assignments, come to the legal ownership of J. Hill and W. Harrison. In 1727 Popham demised other parts of \*his land for a term of years; and this, by renewals and assignments, had now come to the legal ownership of the plaintiff. The question between the parties was as to the ownership of a strip of waste

[ \*489 ]

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[ \*490 ]

land, six or seven yards in breadth, lying between the land of Hill and Harrison and a high road. It was admitted to have passed by one or other of the demises mentioned: the plaintiff contended that it was comprised in the demise of 1727; the defendants, that it was comprised in that of 1723. Neither the names, nor admeasurements. nor other description of the parcels in the two demises afforded the means of ascertaining in which demise the strip was comprehended: but evidence of acts of ownership was given on both sides: and, for the defendants, it was further contended that a presumption, more or less strong, must be made in favour of the defendants from the circumstance that, at the time of the demise in 1723, Popham, the owner of the land then demised, was owner of the strip of land in question, and would therefore most probably have demised the whole up to the road. The learned Judge told the jury that such a presumption would be proper if the question were between the lord of the manor and the owner of the freehold of the demised property; but that no such presumption could be made in a dispute between two parties both claiming by demises under the same owner of the freehold. Evidence was also given by the plaintiff that all the defendants, except the defendant Hill, had joined in cutting down a tree, and, in doing so, had gone over the strip of land in question; but it appeared doubtful whether the tree stood within the strip. At the close of the plaintiff's case, no evidence having been given to implicate the defendant Hill, the counsel \*for the defendants claimed an acquittal for him before opening the case for the defence: but the learned Judge refused so to direct: and evidence connecting the defendant Hill with the acts done came out in the course of the case for the defendants. The jury were of opinion that he had taken a part in the trespass, that the strip of land in question belonged to the plaintiff, and that the tree stood within the land belonging to the defendants, but that, in going to cut down the tree, the defendants had trespassed on the strip of land. Verdict, on the issue on the first plea, for the plaintiff: on the issue on the second plea, for the plaintiff: on the issue on the third plea, for the plaintiff as to all but the trees, and, as to them, for the defendants: on the issue on the fourth plea, for the defendants: on the issue on the fifth plea, for the plaintiff: on the issue on the sixth plea. for the plaintiff.

Cockburn, for the defendants, now moved for a new trial:

First, the learned Judge misdirected the jury in telling them that no presumption could arise as to the strip of waste land having been included in the demise of 1723. The question is not as to the weight of the presumption, but whether such presumption was to be altogether excluded from the consideration of the jury. It would undoubtedly have arisen against the owner of the manor: Doe d. Pring v. Pearsey (1). It cannot be destroyed by the lord afterwards making a second grant: whatever was evidence against the lord would be evidence against his grantee.

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(Patteson, J.: I cannot see any ground for the presumption in your case. The \*way in which such a presumption is said to arise is, that the road has been granted by the owners of the adjoining land, and that their ownership therefore extends up to the middle of the road; but how can that argument apply when the whole has belonged to one person, who has granted a part to one grantee and a part to another?

[ \*491 ]

LORD DENMAN, Ch. J.: I always thought that presumptions of this nature were put too widely (2).)

Next, Hill was entitled to his acquittal at the close of the plaintiff's case. In Child v. Chamberlain (3) Parke, J. said, "It is now perfectly settled by the unanimous decision of all the Judges, that when at the close of the plaintiff's case there is no evidence against a particular defendant, that defendant is then entitled to an acquittal. In consequence of the discrepancy of practice of different Judges, the matter was brought before them all, and they have determined on that rule." In Hawkesworth v. Showler (4) Lord Abinger stated that the rule acted upon by the Judges was "that a defendant in trespass shall not be acquitted for the purpose of giving evidence, till the evidence on the part of the plaintiff has been concluded;" thus assuming that, at that step, the acquittal should be taken.

(LORD DENMAN, Ch. J.: In Sowell v. Champion (5) we held that this was discretionary with the Judge; and the more usual practice certainly is to let the whole case go on. Where one party is acquitted, he might be called for the defence, and prove that he,

<sup>(1) 31</sup> R. R. 209 (7 B. & C. 304).

<sup>(4) 12</sup> M. & W. 45, 48.

<sup>(2)</sup> See Rex v. Hatfield, 43 R. R. 322 (4 Ad. & El. 156, 164).

<sup>(5) 45</sup> R. R. 514 (6 Ad. & El. 407, 415).

<sup>(3) 1</sup> Moo. & Rob. 318.

WHITE HILL. [ \*492 ] and not any of the other defendants, was the real wrong doer. I know of no meeting of the Judges at \*which any such resolution has been come to as that spoken of in Child v. Chamberlain (1).)

Per Curiam (2):

Rule refused.

1844. Nov. 7.

#### DOE D. ROBINSON v. BOUSFIELD.

(6 Q. B. 492-494; S. C. 14 L. J. Q. B. 42; 1 Car. & K. 558; 8 Jur. 1121.)

[ 492 ]

[ \*493 ]

Tenant of copyhold demised to A. from year to year, and, pending the demise, made a lease of the reversion for twelve years to B., contrary to the custom of the manor, by which no tenant might demise without license for more than three years. In ejectment by B. against the yearly tenant whose term had expired: Held that defendant could not allege the invalidity of the twelve years' lease:

For a lease made contrary to custom is good against all but the lord; and, even as between parties to the lease and the lord, the demise against custom is only a ground of forfeiture, which the lord may waive.

EJECTMENT for lands in Westmoreland. On the trial, before Pollock, C. B., at the last Summer Assizes at Appleby, the plaintiff had a verdict.

Knowles now moved (8), by leave reserved at the trial, for a rule to show cause why a nonsuit should not be entered. and ground of motion will appear sufficiently by the judgment of the Court, which was delivered in this Term (November 25th) by

# LORD DENMAN, Ch. J.:

In this case, tried before the Lord Chief Baron at Appleby, Mr. Knowles, by leave, moved to enter a nonsuit. The lessor of the plaintiff claimed under a lease for twelve years, granted by Scott. a copyholder of the manor of Brough. By the custom of the manor, the tenants may demise, without license, \*for three years and no more. The defendant had been tenant from year to year of

Scott, and was holding over after notice to quit. It was objected that the lease for twelve years, being not warranted by the custom, was void, and conferred no title on the

lessor of the plaintiff: for which Jackson v. Neal (4) was cited, in which it was held that a lease by a copyholder who had obtained a licence, and made a lease not warranted by it, was void, and the

(1) 1 Moo. & Rob. 318,

(3) Before Lord Denman, Ch. J., (2) Lord DENMAN, Ch. J., PATTESON, Patteson, Williams and Coleridge, JJ.

(4) Cro. Eliz. 394,

WILLIAMS and COLERIDGE, JJ.

essee could not maintain ejectione firme against a stranger. In the ame volume, however, in Haddon v. Arrowsmith (1), it is said by ounsel in argument that it hath been here adjudged that lessee for rears of a copyhold, which is made without licence of the lord, may maintain an ejectione firme, because he is lessee, against all but the lord. And there Gawdy, J. said that a lease not warranted by the licence was good betwixt the lessor and lessee, and against all strangers (2). And, even as against the lord, a lease not warranted by the custom may become good; for it was held in The Lady Montague's case (3) that, "if a copyholder makes a lease of his copyhold land contrary to the custom; and the lord of the manor dies before his entry or seizure for the forfeiture; that he or they in reversion or remainder shall never take advantage of the forfeiture done or committed before his or their time." The same law will be found in Eastcourt v. Weeks (4).

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Robinson
r.
Bousfield.

These cases are important as establishing that a lease beyond the custom is not void, but only a ground of forfeiture, which may be waived by the lord, and which the reversioner even cannot avail himself of, much less a mere stranger. There is no ground, therefore, for the present application: and we do not wish to encourage a doubt upon the matter by granting a rule. There will be no rule.

[ 494 ]

Rule refused.

# CASTRIQUE v. BERNABO.

(6 Q. B. 498-500; S. C. 14 L. J. Q. B. 3; 9 Jur. 130.)

1844. Nov. 9.

In an action against indorser of a bill of exchange, issue was joined as to notice of dishonour. It appeared that a letter containing the notice was put into the post on the day on which the action was commenced, and, by the routine of the post office, would reach the defendant between four and five in the afternoon of that day. No further evidence was given as to the time of notice. The offices of the Court were open only till five in the afternoon of the day in question.

Held, that the plaintiff must fail, it lying on him to show that the right of action was complete before the suit was commenced.

DECLARATION in debt, on a writ issued 25th May, 1844, by indorsee of a bill of exchange, drawn 20th January, 1844, at four months, against the indorser, averring acceptance by the drawee,

- (1) Cro. Eliz. (461); S. C. Owen, 72.
- (2) Knowles, in moving, adverted to a suggestion made by the LORD CHIEF BARON at the trial, that the lease, though bad for twelve years, might take effect for three. In answer to
- this, Knowles referred to Com. Dig. Copyhold (K 3), and Haddon v Arrowsmith, Owen, 73, there cited.
  - (3) Cro. Jac. 301.
  - (4) 1 Salk. 186,

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[ \*499 ]

[ \*500 ]

nonpayment by him at maturity, and that the bill was then protested, of which defendant then had due notice.

Plea, that defendant had not due notice of nonpayment. Issue thereon.

On the trial, before Lord Denman, Ch. J., at the London sittings after last Trinity Term, the plaintiff proved that a letter to defendant, containing notice of dishonour, was put into a receiving house in the city of London, between two and three in the afternoon of the 25th of May, the day on which the action was commenced. The defendant resided in Oxford Street, London. For the defendant evidence was given of the \*routine of the post office as it existed some years ago; from which it appeared that, at the time referred to by that evidence, a letter so put into a receiving house in the city would not be delivered in Oxford Street before six o'clock in the same evening. It appeared, further, that the offices of the Court were open on the 25th of May till five o'clock only. On this evidence it was contended that no right of action had existed at the time when the suit was commenced. It was however suggested, on the part of the defendant, that an alteration had recently been made in the post office arrangements, by which the delivery was accelerated. The LORD CHIEF JUSTICE, with the consent of the parties, directed that evidence of this should be procured, that the plaintiff should be nonsuited, but that leave should be given to move for a verdict for the plaintiff if the evidence should justify it. Another cause was then called on: and, in the course of the day, evidence was given that, according to the routine of the post office on 25th May, the letter would reach Oxford Street between four and five in the afternoon.

Willes now moved to enter a verdict for the plaintiff, according to the leave reserved:

The evidence showed the possibility of the writ being issued at a time later than that at which the notice would arrive. Which occurrence took place first, does not directly appear. But the presumption of law is that, where two acts appear to have been done, and it is not shown in what order they have been done, that order is to be assumed which will make the whole regular. The action was maintainable instantly after the notice was received:

\*Siggers v. Lewis (1). In Aikman v. Conway (2) it was holden that,

<sup>(1) 40</sup> R. R. 608 (1 Cr. M. & R. 370; (2) S M. & W. 71. S. C. 4 Tyr. 847).

two acts be done in the same day, the Court will not inquire hich was done first, but will presume that they were done in the gular order. The declaration shows a notice before action brought; such notice had not been given, the defendant might have pleaded a batement: Com. Dig. Abatement (G 6).

CASTRIQUE c. BERNABO.

#### ORD DENMAN, Ch. J.:

The rule of law is that, where there is a doubt which of two courrences took place first, the party who is to act upon the ssumption that they took place in a particular order is to make he inquiry. That is founded on reason. An opposite rule would astify a party in suing where he had not ascertained his right. t follows that the plaintiff, in this case, has taken upon himself to how that a right of action existed before he commenced his suit: nd, not having done this, he must fail.

WILLIAMS, COLERIDGE and WIGHTMAN, JJ. concurred.

Rule refused.

## THE LONDON ASSURANCE CO. v. BOLD.

(6 Q. B. 514-525; S. C. 14 L. J. Q. B. 50; 8 Jur. 1118.)

1844. Nov. 12.

[ 514 ]

The condition of a bond given by defendant to plaintiff, after reciting that A. had been appointed agent for plaintiff, which employment he had accepted, and undertaken to perform the trusts thereof, was declared to be that, if A. should, during his continuance in such employment, faithfully demean and conduct himself, and, when required, account for and pay to plaintiff all moneys which he had received or should thereafter receive for plaintiff's use, the bond should be void.

Declaration on the bond set out the condition, and averred that, while A. remained in the employment of plaintiff, as agent aforesaid, A. received for the use of plaintiff moneys, amounting &c., but did not, when required, account &c. Plea, that A. did not, while he remained in the service of plaintiff as such agent as in the declaration mentioned, receive for the use of plaintiff the sums mentioned:

Held, that plaintiff did not support the issue by proof that A. and B., as partners, were employed by plaintiff as agents, and in that character had jointly received money for plaintiff's use, it appearing that A. had never been employed by plaintiff, or received money for him solely.

And that no difference would be made by proof that defendant knew that A. was to be employed only as partner with B.

Deer on bond. On the trial, before Lord Denman, Ch. J., at the London sittings after Hilary Term, 1843, a verdict was found for the plaintiffs, and damages assessed on the breach of the condition of the bond, subject to a special case; which was stated substantially as follows.

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The declaration alleged that heretofore, to wit on &c., defendant and one Thomas Addison, by their certain writing obligatory, sealed &c. (joint and several bond for 1,000l. payable to plaintiffs), subject to a condition, whereby, after reciting that the above bounden T.A. had been appointed agent to plaintiffs, which office or employment he had accepted, and undertaken to perform the trusts thereof, the condition was declared to be, that, if T. A. did and should, from time to time, and at all times, during his continuance in the said office or employment, truly and faithfully demean and conduct himself as such agent, and, whenever thereto required, account for, pay and deliver to plaintiffs, their successors, &c., or such person or persons as \*should be by them appointed for that purpose, all and every sum and sums of money which T. A. had then already received, or should or might at any time thereafter receive, for or on account or for the use of plaintiffs, and also if T. A. did or

[ \*515 ]

should, whenever thereunto required, give and deliver to plaintiffs, their successors &c., or to such person or persons as should be by them appointed for that purpose, all and every the books, accounts, writings and things whatsoever belonging to plaintiffs, with which T. A. should be entrusted, or which should come to his hands or power on account or for the use of plaintiffs, then the said writing obligatory to be void, otherwise &c. Averment that T. A. remained and continued in the service of plaintiffs, as agent to plaintiffs, for a long space of time, to wit from 7th September, 1836, until a certain other day &c., to wit 1st January, 1842; and that, during the said time that T. A. remained and continued in the service and employment of plaintiffs as agent aforesaid, T. A. had and received, for and on account and for the use of plaintiffs, divers sums of money, amounting &c., to wit 445l. 6s. 10d.: nevertheless T. A. did not, when thereunto required, to wit on 1st January, 1842, account for, pay or deliver to plaintiffs, or to any person or persons appointed by them for that purpose, the last mentioned sum of money so due from T. A., or any part thereof; but, on the contrary. although T. A. was then and often since requested by plaintiffs so to do, he therein wholly failed and made default, and converted and disposed of the last-mentioned sum of money to his own use, contrary to the form and effect of the condition of the said writing obligatory: by means of which &c. the said writing obligatory hath become forfeited; \*and thereby an action &c. Nevertheless defen-

[ \*516 ]

dant &c. (non-payment); and the said sum of 1,000l, still is and remains wholly unpaid.

Plea 1. That T. A. did not, during the time that he remained and continued in the service of plaintiffs as such agent as in the declaration mentioned, have or receive for or on account or for the use of plaintiffs the sums of money in the declaration in that behalf mentioned, or any or either of them, or any part thereof, in manner and form &c. Conclusion to the country. Issue thereon.

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(There was another plea, not insisted on by defendant.) The facts were as follows.

In May, 1836, Edward S. Boult, of Liverpool, sharebroker and general commission agent, had been appointed agent to the plaintiffs for Liverpool and parts adjacent: and thereupon the said Edward S. Boult, with Peter Boult, entered into a bond for the same amount as the bond of Thomas Addison and defendant, and with a similar condition. Edward S. Boult acted alone as agent for plaintiffs, until he entered into partnership with Thomas Addison, as after mentioned.

On 20th August, 1836, Boult wrote the following letter to the plaintiffs, addressed to Alexander Boetefeur, their clerk in London, who managed that department of their business.

"I have to apprize you that I have recently entered into partnership with my friend Mr. Thomas Addison, junior, of this town. His connections are amongst the worthy and most respectable inhabitants of the town: and it would be a pleasure to me, and I believe very \*advantageous to the Company, to permit his name to be associated with my own as their accredited agent. May I trouble you to represent this to the board: and, if they consent, to inform me if anything be necessary beyond appending to the advertisements Boult and Addison, instead of my own name. Any references or security that may be required Mr. A. is prepared to give.

[ \*517 ]

"E. S. BOULT."

On 22nd August, 1836, Boetefeur, by direction of the plaintiffs, wrote to Boult the following answer:

"On Friday next I will inform the committee that it is your wish that Mr. Thos. Addison, junior's, name should be added to yours for conducting the agency. I apprehend that a new bond will be requisite, the expense of which he must bear."

On 26th August, 1836, Boetefeur, by similar direction, wrote to Boult as follows:

"I have placed before the committee your letter of 20th

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instant, proposing that the name of your partner, Mr. Thomas Addison, junior, may be added to your own in the agency: and I am directed to inform you that the committee will agree to the proposition, on condition that Mr. Addison do give security to the amount of 1,000l. Upon your furnishing me with the name and a reference (in London if possible), the bond shall be made out and forwarded for execution."

On 30th August, 1836, Boult wrote to Boetefeur as follows:

"I am in receipt of your favour of the 26th instant; and [\*518] I beg to tender for Mr. Addison the name of Mr. \*Thomas Bold, of the firm of Bold and Russell, brokers, of this town, as his security.

"The signature of E. S. Boult, - Boult and Addison."

Do. Thos. Addison, junr.—'Boult and Addison.'"

On 2nd September, 1836, Boetefeur wrote to Boult as follows:

"I have placed your letter of the 30th ult. before the committee, who have approved the security of Mr. Addison. The bond accompanies this; which when executed I will trouble you to return."

On 7th September, 1836, Thomas Addison and the defendant executed the bond mentioned in the correspondence, and on which this action is brought.

On 7th September, 1836, Messrs. Boult and Addison wrote to the plaintiff's secretary enclosing the said bond duly executed.

There was a board placed over, or in front of, the counting house or office of Boult in Exchange Buildings, Liverpool, describing him as agent to the plaintiffs; which board was altered, in September, 1836, and replaced in the front of the same office, the partnership firm of Boult and Addison being then inserted thereon, describing them as agents to the plaintiffs; and their names were also inserted in the public advertisements as such agents; and they continued in the service and employment of the plaintiffs, and to act as such agents, down to the time of their stopping payment on 22nd June, 1841: when Boult and Addison communicated that fact to the plaintiffs by a letter, of 22nd June, 1841, to Boetefeur, and which was as follows:

[\*519] "We regret to inform you that, owing to severe losses \*from bad debts and other circumstances, we are under the painful obligation to suspend our payments. The balance due to the Company is of course secured by our sureties Mr. Bold and Mr. Boult. We are." &c.

"BOULT AND ADDISON."

On 25th June, 1841, the said Boetefeur, by the plaintiffs' direction, wrote to the defendant the following letter:

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"On the 28rd instant I received a letter from our agents, Messrs. Boult and Addison, informing me that, owing to severe losses from bad debts and other circumstances, they were under the painful obligation to suspend their payments: a communication which has occasioned me much regret. As you are surety for Mr. Addison, I beg to apprize you that the premiums and duty owing to this corporation will amount to between 400l. and 500l."

On 7th August, 1841, Boetefeur, by direction of plaintiffs, again wrote to the defendant:

"On 25th June I wrote to inform you that Messrs. Boult and Addison, late agents to this corporation, were indebted to the Company between 400l. and 500l. The account has been agreed: and the balance is 445l. 6s. 10d. As you are joint security with Mr. Peter Boult, I will thank you to arrange with that gentleman, so that the sum of 445l. 6s. 10d. may be remitted to the corporation: sincerely regretting to have to call on you on this distressing occasion."

On 8th August, 1841, the defendant wrote to Boetefeur as follows:

"I have received your favours of the 25th June and 7th instant, and will, without loss of time, see Mr. Peter Boult to make arrangements for the settlement of Messrs. Boult and Addison's account with your Company. In the mean time, I beg the favour of your sending me a copy of the bond I signed; and please also state if Mr. Peter Boult's is of exactly the same tenor."

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Annexed to the case were copies of the two last accounts between the plaintiffs and Boult and Addison, showing the balance due to the plaintiffs, and which were to be read as part of the case; and also copies of the last account between Boult and the plaintiffs, and the first account between Boult and Addison and the plaintiffs. The accounts showed a balance due from Boult and Addison to the plaintiffs for money received. All these accounts were sent in the first instance from the plaintiffs to Boult prior to his partnership, and afterwards to Boult and Addison down to the period of their failure, and were received by the parties at Liverpool, and the blanks left for their charges, and for advertisements, filled in; and the accounts were then sent back to the plaintiffs, and corrected, if necessary, and, when approved, retained by the plaintiffs.

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[ \*521 ]

contended:

The defendant contended at the trial that the letters which passed between Boult and Boetefeur were not evidence in this cause against the defendant; which point was reserved for the opinion of the Court: and that this action could not be maintained against defendant on the above facts, because, in fact, Boult and Addison were the agents of the plaintiffs, and not Thomas Addison, junr.; and that the money in question was jointly received by Boult and Addison as joint agents, and not by \*Thomas Addison,

First, That such last objection could not be raised on the defendant's pleading; and, secondly, if it were so raised, that the plaintiffs were still entitled to recover.

junr. alone, or as sole agent. In answer to which the plaintiffs

The Court were to draw inferences as a jury might.

## Kelly, for the plaintiffs:

The question is, whether, upon the facts stated, the money received by Boult and Addison jointly is within the condition of the bond. Addison never was, and never was supposed to be, separately agent for the plaintiffs; nor was he ever in a capacity to receive moneys separately for them. Therefore, the moneys received jointly are, within the meaning of the condition, received by Addison in the course of his conduct "as such agent." And the defendant's letter of 8th August, 1841, shows that he was perfectly aware of the partnership. It is true that the meaning of the condition of a bond is to be collected from the language of the instrument itself: but, if the language admits of a double interpretation, that lets in extrinsic evidence. [He referred to Barclay v. Lucas (1) and Belluirs v. Ebsworth (2).]

[ 522 ] (COLERIDGE, J.: If, as you say, the condition on the face of it has a double meaning, you are seeking to give evidence to explain a patent ambiguity.)

There is no ambiguity at all, in the sense of the rule referred to.

It is not that the language \*may apply to one only of two cases and there is doubt to which it applies; but that it comprehends both. If Boult and Addison had received the money jointly, the condition might well recite a receipt by Addison. So a debt due from a defendant as surviving partner may be described as a debt due from

(1) Note (a) to Barker v. Parker, (2) 13 R. R. 750 (3 Camp. 53). 1 R. R. 201 (1 T. R. 291).

him individually. [He cited Richards v. Heather (1) and Rice v. Shute (2).]

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## W. H. Watson, contrà:

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This is merely a question on the construction of the condition. The defendant never became surety for Boult and Addison, so far as the language of the instrument goes; and that language cannot \*be enlarged by extrinsic evidence. Chapman v. Beckinton (3) is a very strong case for the defendant. (He was then stopped by the Court.)

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#### LORD DENMAN, Ch. J.:

The only question certainly is as to the meaning of the condition. And of that there can be no doubt. When a party makes himself surety for the conduct, not of A. and B., but of A., the stronger proof you give that he knew the relation in which A. and B. stood to each other, the stronger you make the inference arising from his mentioning only A. Suppose the condition recited that the two were joint agents, and then spoke only of the conduct of one. would not that be a strong proof that the suretyship was intended to apply only to the separate acts of that one? Mr. Kellu's comment upon Bellairs v. Ebsworth (4) is very ingenious: but the case is quite against him. Lord Ellenborough, with his usual strong sense, says: "The defendant was surety for Philip Nott, and not for Mingay, Nott & Co." Mr. Kelly says that evidence of the relation of the parties was there necessarily admitted: the language of the report is "it appeared:" whether that was upon the mere opening is not said. Lord Ellenborough argues entirely on the recital and the scope of the condition. Here too, even if the defendant's knowledge of the partnership were a fit subject of enquiry, I do not see that it is shown. His letter of 8th August, 1841, does not show it.

# WILLIAMS, J.:

Engaging for the good conduct of one man, and engaging for the good conduct of two, \*are essentially different engagements, both

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- (1) 1 B. & Ald. 29.
- (2) 5 Burr. 2611; S. C. 2 W. Bl. 695. It appears from Stackwood v. Dunn (3 Q. B. 822), that a plea in bar, by a sole defendant in assumpsit, alleging that the promise was made by

him and L. jointly, and then setting off a debt due to the two, contains a good confession.

- (3) 61 R. R. 361 (3 Q. B. 703).
- (4) 13 R. R. 750 (3 Camp. 53).

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in ordinary understanding and in legal effect. Mr. Kelly does not, and could not, contend that any evidence could be resorted to for the purpose of enlarging the sense of the condition. The case which he suggested, most nearly approaching to the admission of evidence here, was that of a deed describing land by its being let to A. for a certain term. In that case, he said, the facts must be enquired into. They must so: that is a case of latent ambiguity. Lord Cheyney's case (1) is the earliest authority which I recollect on that point. But this is not a case of latent ambiguity. Mr. Kelly seeks to show that he is using the evidence, not to extend the meaning of the bond, but to prove the fact of a breach. No doubt all facts may be put in evidence that establish that: but the evidence here is not applied eo intuitu. I agree that the whole question resolves itself into the construction of the condition: and it is clear to me that it would be a distinct violation of the meaning expressed by the language of the condition to introduce a responsibility for more than the party named.

#### COLERIDGE, J.:

I agree that the meaning of a written instrument often requires to be shown by extrinsic evidence; but then the evidence is produced to explain the intention which is expressed in the instrument. But, where a clear meaning appears without any evidence at all, we must not break in upon the rule which prohibits the varying of a written instrument by extrinsic evidence. The meaning here is perfectly clear: Mr. Kelly's construction would amount to the addition of a liability for \*the conduct of a party not named. As to the language of the plea, we must suppose that it admits the agency and denies the receipt in the same sense in which they are alleged in the declaration: that brings us back again to the language of the condition.

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## WIGHTMAN, J.:

The question is whether a condition, by which a party makes himself answerable for the conduct of one person, renders him liable for the conduct of another with whom that person acts jointly. Recourse is had to the analogy of cases of latent ambiguity; and it is sought to show, by extrinsic evidence, an intention beyond the language of the condition. If we are to determine this case on the extrinsic evidence, I think the result will

be against the plaintiffs. For, if the defendant did know that the partnership existed, and yet undertook, in the condition, a responsibility for the conduct of Addison only, it looks as if he did not intend more. In truth, the recital is the proper key to the meaning of the condition. In Hassell v. Long (1), which has not been adverted to, a question arose whether a bond conditioned to secure the payment of all sums received by a collector extended beyond the current year: and Lord Ellenborough said that the recital was the "proper key" to the meaning, that it spoke of the party as collector and receiver of the land tax, that the land tax was an annual tax, that the party, as receiver, was an annual officer, and that in the recital "not one word occurs describing an act or intimating a receipt beyond the limits of the then current year of collection." Here the recital does not contain \*a word referring to any agency but that of Addison. Then Mr. Kelly raises the question, whether the receipt by Addison and Boult is a receipt by Addison. On ordinary principles, each party is liable for receipts by either. But the question here is, not to what extent the one can make the other liable to the employer, but whether the defendant became surety for the acts of both. Mr. Kelly urged that the defendant would be liable for whatever Addison's clerk, as such, might receive. It appears to me that this is inapplicable to the question. No doubt the receipt by the clerk is a receipt by his master. But the receipt by a partner is a receipt by both partners: Boult had as much power as Addison to appropriate the money received: Addison could not take the money out of Boult's hands as he could out of those of his own clerk: no money therefore was received by him separately. Bellairs v. Ebsworth (2) is a direct authority in favour of the defendant. As to the plea: it is contended that this receipt comes within the language of the issue. think there is no weight in that: we must take the plea with reference to the matter charged in the declaration; and it seems to me that the receipt charged in the declaration is a receipt by Addison in a separate capacity, and not such a receipt as appears on these facts.

Judgment for defendant.

(1) 2 M. & S. 363.

(2) 13 R. R. 750 (3 Camp. 53).

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#### DOE D. WARWICK v. COOMBES.

6 Q. B. 535-543; S. C. 14 L. J. Q. B. 37; 8 Jur. 1166.)

By the written customs of the manor of Hackney (confirmed by stat. 21 Jac. 1, c. 6, private), every person to whose use lands are surrendered "ought to come within three years" after the surrender is presented, and be admitted (sect. 34).

Held, that this custom was only for the benefit of the lord, who might waive it, and grant's valid admittance after the expiration of the three years. Therefore, where P., copyholder of the manor, surrendered to the use of W., who was admitted more than three years after presentment of the surrender: Held that W., after admittance, might maintain ejectment against P. and all claiming under her.

EJECTMENT for a messuage and land. On the trial, before Coleridge, J., at the Middlesex sittings after Easter Term, 1840, it appeared that the premises were of copyhold tenure, parcel of the manor of Hackney, commonly called the Lord's Hold, in Middlesex. A verdict was found for the plaintiff, subject to the opinion of this Court upon a case, the material parts of which were as follows.

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Mary Susannah Piggott, being seised of the premises \*for an estate to her and her heirs, according to the custom of the said manor, by an indenture, by her duly executed and enrolled, bearing date 28th August, 1815, between her, M. S. P., of the first part, John Green of the second part, and Guy Warwick, one of the lessors of the plaintiff, of the third part, in consideration of 1,050l. by Green paid to M. S. Piggott, bargained and sold unto Green, his executors, administrators and assigns, an annuity of 110l. during the lives of Green and his wife, and the longer liver of them, and charged the same upon the premises in question; and covenanted with Green, his executors, &c., that, if the annuity should be unpaid for twentyone days, it should be lawful for him, his executors, &c., into the premises in question to enter, and receive the rents and profits thereof; and also covenanted that she, M. S. P., would surrender the premises in question to the use of Guy Warwick, upon trust for the better securing the regular payment of the said annuity, and. subject thereto, and to the powers therein contained for levying and raising the said annuity and all costs incurred by reason of the nonpayment thereof, upon trust for the said M. S. Piggott, her heirs, &c.

On the day of the date of the said indenture, M. S. Piggott made a conditional surrender, out of Court, of the premises in question, to the use of Guy Warwick, upon the trusts of the indenture; and such surrender was presented by the homage at a general Court baron which was the next general Court baron held for the said manor, viz., on 23rd April, 1816: but Warwick was not admitted tenant, pursuant to the surrender, by the lord of the manor, according to the custom thereof, at a Court baron held for the said \*manor, until 11th April, 1820, being a period of more than three years after presentment of the surrender. There was evidence that it was not usual to be admitted on conditional surrenders necessarily within three years after such surrenders; and that there were many such surrenders, and many admittances in fact, after the expiration of three years.

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On 3rd April, 1820, all arrears of the said annuity were duly paid.

Mrs. Piggott died in 1838. The defendants are her personal representatives.

Green died in 1818; and Mrs. Green died in February, 1839. The lessor Martha Isabella Ramsey is the personal representative of Green: and an arrear of the said annuity then was, and still is, due to her.

The customs of the said manor were settled by an indenture between the lord and his copyhold tenants, dated 20th June, 15 Jac. I.: and such indenture was confirmed by an Act of Parliament, 21 Jac. I. c. 6 (private) (1). Some of the customs therein contained are as follows:

1. "In primis, by the customs of the said manors, and either of them, all the copyhold lands, tenements and hereditaments," &c. (statement that the lands, &c., held by persons named in the indenture, were copyhold and customary). "And all the said lands, tenements and hereditaments have been passed, and are to pass and go from such persons as, according to the contents of these schedules, have power and are enabled to make surrenders to any other person or persons by way of surrender, to be made to the hands of the lord, by the acceptance of the steward of the manor," &c. (describing different modes of surrender). "Which surrender or surrenders have been, and shall and may be to the use of any person or persons, and their heirs for ever in fee-simple, or any person \*or persons in fee tail, or for life or lives, with remainders or without remainders, as lands may be assured by the course of the common laws of this realm, or else to the use of the last will and testament of the surrenderers, or of any other persons, according to the intent and limitation of such last will and testament."

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(1) "For confirmation of the copyhold estates and customs of divers copyholders of the manors of Stepney and Hackney, according to certain indentures of agreement, and a decree in the High Court of Chancery, made between the lord of the said manors and the copyholders." DOE d.
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- 19. "Item, by the custom of the said several manors, every copyholder of inheritance in fee-simple may surrender his said copyhold lands and tenements, or any part or parcel thereof unto the lord to the use of any person or persons, and to his and their heirs for ever, or to his or their heirs, of his or their bodies, or any otherwise in tail, or for life or lives, or years, or to any person or persons, and his or their heirs, to the intent the said copyhold tenant may declare his last will and testament upon the same lands and tenements, or to any other use or uses, unless it be to any corporation or corporations, or bodies politic or corporate, and every copyholder in tail, or for life, lives or years, of either of the said manors, may in like manner, by the customs of the said manors, and of either of them, surrender their copyhold lands, tenements or hereditaments, or any part thereof, according to the nature of their estates, so the same surrender be made according to the custom concerning surrenders, as afore in these presents is specified, or hereafter ensueth; and all the same persons, to whose use every surrender shall be made, are to have their copies made to hold of the lord by the rod, according to the custom of the manor whereof they have been holden by the rents and services therefore due and accustomed; upon every of which surrenders the fine and fines for the same hereafter expressed, is by the said custom to be paid, and to be entered into the several copies, or the margents of them."
- 22. "Item, all surrenders taken of women, as aforesaid, or of men" &c. (recapitulating the modes of surrender), "shall be and ought to be by the homage presented at the first or second next general Court holden for the manor whereof the same is holden after the taking thereof, or within one year and a day next after the taking of the same surrender, if any such general Court be holden within a year and a day next after the same surrender so taken; or else if no such general Court be holden within a year and a day, then to be by the homage presented at the next general Court to be holden for the same manor, next after the same year and day, is and shall be a good surrender, as if the same had been taken by the steward or his deputy of that manor, or woman examined, as aforesaid, in open Court; or otherwise, all surrenders taken by the said reeve," &c., "and not presented by the said homage in manner and form aforesaid, are and shall be void." Then followed a declaration that every surrender to the use of a will, not presented according to particular rules laid down, "is and shall be void."
  - 25. "Item, all surrenders" of a particular kind, are to be published

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and notified as there prescribed, "or else those surrenders are also void."

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- 27. "Item, the lord or lords of the said manors, or either of them, \*and their and every of their stewards for the time being, shall and ought to accept and allow of all and every surrender and surrenders to be made of any the lands, tenements or hereditaments, whereof any of the persons named parties to the said indenture are seised as copyholders, according to the tenor, intent and true meaning of these schedules, and the articles therein contained; so as the parties surrendering be not before that time by the homage of the same manor presented, and found to have made or committed some matter of forfeiture of those lands and tenements so surrendered, contrary to the customs and articles in these schedules expressed, or some or one of them. And the lord of the same manor by his steward, for such fine, as in or for such things is before expressed, shall grant the same copyhold lands, tenements and hereditaments so surrendered, according to the tenor, use and intent of the same surrender; and shall duly admit such person or persons to whom, or to whose use, such surrenders shall be made."
- 34. "Item, every person to whose use any of the said lands or tenements shall be surrendered, ought to come within three years after the same be presented, and take up the same by himself, if he be of age, and to be admitted, as aforesaid, and to pay his fine, or else by his guardian, as aforesaid."
- 49. "Item, for treason or felony whatsoever that shall be committed by any copyholder of the said manors, or of any of them for which he shall be lawfully attainted, he shall forfeit his copyhold lands and tenements to the lord of the said manor; and for all other offence or offences, act or acts whatsoever, for which a freeholder ought, by the common laws of the land, to forfeit his freehold lands and tenements, there a copyholder of the said manors, or of either of them, shall forfeit as a freeholder ought to forfeit in like case his freehold; but if a copyholder be outlawed for any cause saving treason or felony, the lord shall not have the issues or profits of his lands: and if a copyholder make a feoffment of his copyhold, gift in tail, or lease for life or lives by deed or without deed, by livery and seisin thereupon, or shall suffer a recovery at the common law, levy a fine, or wilfully refuse and deny to pay, do or perform his rents, fines, suits, customs and services at any time hereafter due to the lord or lords of the said manors, or of either of them, for their said copyholds, the same wilful refusal being presented

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to the homage by the oaths of three customary tenants, with the reeve or his deputy, (the said tenants or reeve, nor his deputy, being none of the lord's servants,) and being found and presented by the homage, the same shall be holden and reputed a forfeiture of his estate, whatsoever he shall have by copy of Court-roll, at the time of any such act committed or done in so much of his and their copyhold lands and tenements, as he shall have committed any such act, and only for so much of his lands and tenements, out of the which the said quit-rent and other duties are demanded and shall be due, and wilfully denied by the said tenant or \*tenants, as aforesaid; or if any copyholder shall in the lord's Court, or elsewhere in any court of record, disclaim to hold his said copyhold lands and tenements of the lord of the manor whereof his lands and tenements are holden, or shall by pleading in the lord's Court, or other court of record, wilfully claim their copyholds to be freeholds, or willingly and wittingly plead in any real action at the common law in chief as a freehold tenant, or shall willingly and wittingly do any other act or things in or concerning his now lands and tenements, which shall be a disseisin or disinheritance of the lord or lords of the said manors, or of either of them, their heirs or assigns, (other than such acts as in these articles are especial mentioned or dispensed withal,) that then he shall forfeit his and their estate of and in the same lands and tenements so disclaimed to be holden or claimed to be freehold, or for which he shall plead in chief, or do any such other act or thing as is aforesaid. Finally, the lord of the said manors" (Stepney and Hackney), "or of either of them, shall have all such other forfeitures, issues, profits and advantages of the said copyholds, as shall grow due to him by any statute laws of this realm, being not against and contrary to these articles and customs here expressly set down."

It was agreed that the customs of the said manors, as stated in a printed book entitled "Customs and privileges of the manors of Stepney and Hackney, in the county of Middlesex," &c., 1736, should be deemed part of the case (1). The case was argued in this Term (2).

## W. H. Watson for the plaintiff:

The defendants contend that the surrender and admission of Warwick are void, because the admission did not take place within

(1) By sect. 50, it was declared that the acts of certain tenants of particular estates should not prejudice those in remainder. (2) November 12th. Before Lord Denman, Ch. J., Williams, Coltman and Wightman, JJ.

three years of the presentment of the surrender. Sect. 19 of the customs authorizes the surrender, if made according to the custom; other sections regulate the surrenders; and, by sect. 27, the lord must accept surrenders properly made. Then sect. 84 declares that the person to whose use the surrender is made "ought to come within three years " after the presentment of \*the surrender and be admitted. The lord, under this section, has the right to insist upon the party coming in to be admitted; but the surrenderor, and those claiming under her, cannot take advantage of this condition. It was intended for the benefit of the lord, who may enforce it by proclamations and seizure quousque. The surrender is not void: in this respect, the language of sect. 34 differs from that, for instance, of sect. 22, which does declare surrenders taken in a particular way to "be void." There does not appear to be even a forfeiture for non-compliance with sect. 34; for sect. 49, which enumerates the causes of forfeiture, does not specify this. And, if there were a forfeiture, it would enure to the benefit of the lord only. Moreover the lord, by admitting after the expiration of the three years, would have waived the forfeiture had there been one. Customs imposing forfeiture are construed strictly, as was held, in the case of a custom more strongly worded than this, in Baspool v. Long (1). Further, sect. 34 does not apply to conditional surrenders. (The argument on this point is omitted.)

Kelly, contrà :

The admittance not having taken place till after the expiration of the three years, the surrender has become absolutely void; and the title remained in the surrenderor. The general law of copyhold does not apply; these customs are now in the nature of statutory provisions. If a statute were to declare that women "ought" to have dower, that would give them the absolute right. The utmost that could be said here would be that those representing \*the surrenderor are estopped from disputing the surrenderor's act. supposing that to be so, the surrenderor was not a party to the failure of admittance. Her surrender gave a right to admittance within the three years, but no more. No valid admittance, therefore, having taken place, the surrenderee had no title: the surrenderor, till the admittance of the surrenderee takes place, is the tenant. Nor does it make any difference, as to this, that the surrender was only conditional. (The argument on this point is omitted.)

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To hold that sect. 34 absolutely avoided the surrender would be inconsistent with sect. 50, which declares that the default of the tenant for life shall not prejudice the remainderman.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (November 25th), delivered the judgment of the Court:

This was a special case. The land sought to be recovered was copyhold of the manor of Hackney: and the title of the lessors was not disputed, except on one point, the admittance, which, it was contended for the defendants, was void because made more than three years after the presentment of the surrender, and so contrary to the custom of the manor.

The customs of the manor of Hackney were settled by an Act of Parliament in the reign of James I.: and, by the thirty-fourth section, it is provided that "every person to whose use any of the said lands or tenements shall be surrendered, ought to come within three years after the same be presented, and take up the same by himself, if he be of age, and to be admitted, as aforesaid, and to pay his fine, or else by his guardian, as aforesaid."

This was a case of conditional surrender, presented in April, 1816: and the surrenderee was admitted in April, 1820. On the part of the lessors it was contended that, with regard to surrenders of every kind, the custom was to be taken as binding only between lord and tenant, and not in favour of third persons, so as to make an admittance after the three years void: and that, at all events, in respect of a conditional surrender, it would not so apply, where by the intention of the parties no admittance might take place at all; and none would be contemplated until a breach of the condition.

It is unnecessary to consider the latter point, because we agree with the plaintiff on the former. The force of the word "ought," in the recited item, is equivalent to "it is the custom:" and the obvious intent of the custom is that the lord should have his real tenant on the rolls, and know who he is, within a given time, and receive the fine for alienation to which he may be entitled. If the custom be not observed, the lord may insist upon it, and enforce it by such remedies as the customs may give him, seizure quousque or otherwise: but he may also waive it; and he does so by the act of admittance. To the defendants, who are the personal

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presentatives of the surrenderor and mortgagor, and who stand her place, the delay of the admittance works no prejudice: and would be most unjust to allow them to avail themselves of it to efeat the lessor's security. The judgment will be for the plaintiff.

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Judgment for plaintiff (1).

#### PHILIPSON v. THE EARL OF EGREMONT.

(6 Q. B. 587-606; S. C. 14 L. J. Q. B. 25; 8 Jur. 1164.)

Scire facias (2). Declaration, that plaintiff, as public officer of a Banking Company, under stat. 7 Geo. IV. c. 46, recovered in the original action against B., as the registered officer of a Steam Packet Company to which letters patent had been granted under stat. 7 Will. IV. & 1 Vict. c. 73, damages by reason of the non-performance of a promise of the Steam Packet Company, and costs; that plaintiff was still one of the public officers of the Banking Company; and that, although judgment had been given, execution of the damages still remained to be made; that the defendant in the sci. fa. at the time of the making the promise, and from thence until and at the giving of the judgment, was, and thence hitherto hath been, and still is, a member of the Packet Company: Held, that the declaration was not bad for not showing whether the letters patent contained any declaration, under stat. 7 Will. IV. & 1 Vict. c. 73, s. 4, limiting the liability of defendant in the sci. fu. to any, or to what, extent; such limitation, if any existed, being matter that ought to be pleaded by defendant; and that the declaration, alleging that defendant was a member when the promise was made, showed sufficiently that he was a member when the cause of action accrued.

Plea 3, that defendant was not, at the time of the commencement of the original action, liable thereto, as an existing or a former member of the Packet Company; concluding to the country: Held bad, on special demurrer, as not taking issue on any matter alleged in the declaration, and yet concluding to the country.

Plea 4, that the Packet Company was not formed by any deed of partner-ship &c., in compliance with stat. 7 Will. IV. & 1 Vict. c. 73: verification: Held bad, on special demurrer, as setting up a defence which might have been pleaded to the original action.

Plea 5, that the original action was for a demand in respect of which neither the defendant in the sci. fa., the Packet Company, nor the defendant in the original action as such registered officer, was by law liable, as plaintiff at the commencement of the action well knew; and that, the registered officer of the Packet Company and the plaintiff well knowing the premises, the registered officer of the Packet Company fraudulently and deceitfully, and by connivance with plaintiff, suffered the judgment in

- (1) See Doe d. Robinson v. Bousfield, ante, p. 474.
- (2) Though proceedings by sci. fa. have not been abolished (see 63 R. R. p. 754, note (2)) they are, for the purposes of obtaining execution against the shareholders of a Company, practically superseded by the provision of

R. S. C., Ord. XLII. r. 23 (d). The decision in this case upon the fifth plea may, however, still be useful as an authority in the case of an issue under that rule or under Ord. XLVIIIA. r. 8 (see *Davis* v. *Morris* (1883) 10 Q. B. D. 436, 52 L. J. Q. B. 401).—A. C.

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order to charge defendant in the sci. fa.; verification: Held that the plea was good, as containing a sufficient allegation of fraud and collusion between plaintiff and the nominal defendant in the original action; and that the defendant in the sci. fa. was entitled to avail himself of such defence by plea (1).

Semble, that defendant might have availed himself of that defence by

motion to set aside the judgment.

Plea 6, setting out the record of the original judgment, which was in an action of assumpsit by indorsee against drawer on a bill of exchange drawn and indorsed by B. as the agent of the Packet Company, that B. did not, as agent of defendant, draw or indorse the bill, nor did defendant ever ratify the drawing or indorsing thereof: verification: Held bad, on special demurrer, because the defence might have been pleaded to the original action.

SCIRE FACIAS. The declaration set forth the writ, which alleged that R. P. Philipson (the plaintiff), as one of the registered public officers of the Northumberland and Durham District Banking Company, according to the form of the statute &c. (2), recovered "against J. Bleaden, then being the secretary and one of the registered officers of a certain trading Company called the \*Commercial Steam Packet Company, whose principal place of carrying on business was and is situate in that part of the United Kingdom" &c. "called England, and which said J. Bleaden according to our letters patent, under the Great Seal, granted to the said Company, and according to the statute made and passed" &c. (3), "had been and was duly appointed and returned to the

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- (1) See note (2), p. 493.
- (2) 7 Geo. IV. c. 46.
- (3) Stat. 7 Will. IV. & 1 Vict. c. 73, "For better enabling her Majesty to confer certain powers and immunities on trading and other Companies."

Sect. 24 enacts "That all judgments," &c. "obtained in any such actions, suits, or other proceedings as aforesaid against such officer or member in manner aforesaid, whether such member or officer respectively be party to such actions," &c., "as plaintiff, pursuer, petitioner, or defendant or defender, shall have the same effect against the property and effects of such Company or body, and also (to the extent hereinafter mentioned) against the persons, property, and effects of the individual existing or former members thereof respectively, as if such judgments," &c. " had been obtained against such Company or body in suits or proceedings to which

all the persons liable as existing or former members of such Company or body had been parties, and that execution" &c. "shall be issued thereon accordingly: provided nevertheless. that where the extent per share of the liability of the individual members shall have been limited by any letterpatent as aforesaid, no such execution or diligence shall be issued against any such individual existing and former member of such Company or body as aforesaid, for a greater sum than the residue, if any, of the amount for which, by virtue of such letters patent as aforesaid, such individual member shall be liable in respect of the share or shares then or theretofore held by him in the said Company or body, after deducting therefrom the amount, if any, which shall appear by such register as aforesaid to have been advanced and paid in respect of such shares or any of them by himself or

enrolment \*office of the Court of Chancery in England, and registered, as one of the officers of the said Commercial Steam Packet Company to sue and be sued on behalf of the said \*Commercial Steam Packet Company, the sum of 7771. 16s., for the damages which the said Northumberland and Durham District Banking Company had sustained, as well on the occasion of the not performing a certain promise then lately made by the said Commercial Steam Packet Company to the said Northumberland and Durham District Banking Company as for the costs &c., whereof the said J. Bleaden, as the secretary and one of the registered officers &c. is convicted &c.," prout patet &c. "And now, on behalf of the said R. P. Philipson and of the said Northumberland and Durham District Banking Company, in our same Court, we are informed that the said R. P. Philipson remains and is one of the public officers of the said Northumberland and Durham District Banking Company, and named, appointed and registered as aforesaid, and, although judgment has been given as aforesaid, yet execution of the damages aforesaid still \*remains to be made. And, on behalf of the said R. P. Philipson and of the said Northumberland and Durham District Banking Company, in our same Court, we are further informed that the Right Hon. George, Earl of Egremont, at the time of the making of the said promise, for the not performing whereof the said damages were recovered as aforesaid, and from thence until at the giving of the said judgment, was, and thence hitherto has been, and still is, a member of the said Commercial Steam Packet Company: wherefore "&c.

Third plea. That plaintiff ought not to have execution against defendant of the damages aforesaid, because he says that he was not, at the time of the commencement of the action in which the said judgment was so recovered by plaintiff against the said John Bleaden as aforesaid, liable thereto as an existing or a former member of the said Company. Conclusion to the country.

Fourth plea. That the said Commercial Steam Packet Company was not, according to the statute &c., entered into or formed by any deed of partnership or association, or any agreement in writing of that nature, whereby the undertaking was divided into a certain

herself, or any previous or subsequent holder of the same shares or any of them, or the representatives of any such holder, under or by virtue of any former execution or diligence, and not repaid at the time of issuing such subsequent execution or diligence." [Cf. Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 36.]

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number of shares there specified, and in which or in any schedule to which was set forth the name or style of the said Company or body, or names or styles of the members of the said Company or body, the date of the commencement thereof, the business or purpose for which the said Company or body was formed, and the principal or only place for carrying on such business, and containing the appointment of two or more officers to sue or be sued on behalf of such Company or body, \*as mentioned in that behalf in the said statute in that case made and provided. Verification.

Fifth plea. That the action in which the said judgment was so recovered by plaintiff against John Bleaden, as in the declaration mentioned, was brought for and in respect of a certain demand for and in respect of which defendant was not, nor was the said Company, nor the said John Bleaden as such registered officer of the said Company as in the declaration mentioned, by law liable, as the said John Bleaden and the plaintiff, at the time of the commencement of the said action, well knew. That, the said John Bleaden and the plaintiff well knowing the premises, the said John Bleaden did afterwards, to wit on the day and year in that behalf aforesaid, fraudulently and deceitfully, and by connivance with the said plaintiff, suffer and allow the said judgment to be recovered, and the plaintiff did then recover the same, against the said John Bleaden, in order and with intent and purpose that the said plaintiff might thereupon commence an action against, and obtain payment of the amount thereof from, this defendant. Verification.

The sixth plea set out the record of the judgment against Bleaden, rerbatim, commencing "Pleas &c." It was a judgment by nil dicit on a declaration in assumpsit in the common form by Philipson, as public officer, against Bleaden, on a bill of exchange for 1,000l. drawn by A. D. Bosson, the agent of the Commercial Steam Packet Company, and indorsed by him to T. F. Marrico, and by Marrico to the Northumberland and Durham District Banking Company; prout patet &c. The plea then stated that Bosson did not, as agent of him, the defendant, or by his authority, make or indorse the said \*bill of exchange in the said record mentioned; nor did the defendant ever ratify, confirm, or approve of, the said drawing or indorsing the said bill of exchange as aforesaid. Verification.

The plaintiff demurred specially to each of these pleas.

To the third, as amounting to *Nil debet*, and including defences available in the original action, and because the word "liable" was uncertain in its meaning.

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To the fourth and fifth, for the above reasons, and, to the fifth, also for not showing that the plaintiff was party to any fraud.

To the sixth, because it amounted, if to any thing, to an argumentative plea of nul tiel record.

Joinder in demurrer.

The defendant, in the points stated by him for argument, submitted that the declaration was bad for not following the words of stat. 7 Will. IV. & 1 Vict. c. 73, or showing the defendant's liability within the meaning of that Act, but only showing that the defendant was a member of the Commercial Steam Packet Company at the time of the making the promise sued on in the original action; which might well be, and yet he might not have been liable to the original suit within the meaning of the statute: and for not showing that the defendant's liability was not limited by the letters patent, nor to what extent it was limited; and for not showing that the Company was established in conformity with the statute in other respects; and also because, according to the statute, a scire facias would not lie against an individual member on a judgment against the Company.

The case was argued in last Trinity Term (1).

W. H. Watson, for the plaintiff. \* \* \* \* [594]

Erle (with whom was J. W. Smith), contrà. \* \* \* [598]

W. H. Watson, in reply. \* \* \* Cur. adv. vult.

The judgment of the Court was this day pronounced by [603]

LORD DENMAN, Ch. J., who, after stating the nature of the case, proceeded as follows:

The Company was formed under letters patent granted under the provisions of stat. 7 Will. IV. & 1 Vict. c. 73. The first objection to the declaration was, that it did not allege to what extent the defendant was liable by the letters patent, or whether his liability was, in any respect, limited by them, according to the power given by the fourth section of the Act, the execution being,

(1) Friday, May 31st. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

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in such case, limited also by the twenty-fourth section. We are clearly of opinion that, if there be any such limitation, it should be stated by way of plea, by the defendant, and that it was unnecessary for the plaintiff to notice it at all.

The next objection was, that the declaration does not show the defendant to have been a member of the Company when the cause of action accrued, but only when the promise was made; the answer is, that, this being an action of assumpsit, the promise is the legal cause of action.

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But the third plea is here set up, which alleges that the defendant was not, at the commencement of the suit, liable as an existing or former member of the Company. This plea is founded also on sect. 24: but it is bad, because it concludes to the country though it does not deny any allegation in the declaration. The declaration alleges that the defendant, at the time of the promise, and from thence until and at the giving of the judgment, was, and from thence hitherto has been, and still is, a member of the Company. The plea does not deny his so being a member, but states that at the commencement of the suit he was not liable as a member, which is clearly no issue, and is argumentative and bad.

The next objection was raised by the fourth plea, which is founded on sect. 5 of the Act: it is sufficient to say that the matter of this plea might have been pleaded to the action itself, and therefore is clearly not admissible in the present stage of the proceedings. The principle has been settled long ago, and was fully supported in *Bradley* v. *Eyre* (1) and several cases immediately following.

The same answer disposes of the objection raised by the sixth plea.

The fifth plea alleges that the judgment was recovered in respect of a demand for which the Company were not by law liable; that, Bleaden (the officer sued) and the plaintiff well knowing the premises, Bleaden fraudulently and deceitfully, by connivance with the plaintiff, suffered judgment to be recovered in order to charge the defendant. Now, so far as this plea states that the Company had a defence to the action, it is open to the same answer as the fourth and sixth, \*namely that the defence should have been pleaded to the original action. It was suggested, for the plaintiff, that possibly such defence may have been the Statute of Limitations, or the Statute of Frauds, or any other technical

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defence, not touching the merits of the case, and which might have been most honestly waived; and doubtless such a state of things would be consistent with the allegations of the plea: but the gist of the plea is, that, the Company not being liable by law, Bleaden fraudulently and deceitfully, and by connivance with the plaintiff, suffered the judgment, in order to charge the defendant. Now, if these allegations be true, the defendant certainly ought to have some remedy; and the question is, whether that remedy is by pleading as he has done, or by motion to the Court. We are far from saying that the latter course was not open to the defendant. Fraud, no doubt, vitiates every thing; and the Court, upon being satisfied of such fraud, has a power to vacate, and would vacate, its own judgment, as is suggested in Bradley v. Eyre (1). But still such a plea as the present may be good: and indeed we find, in Fowler v. Rickerby (2), that TINDAL, Ch. J. stated that it would be good (3). If the plea had alleged a fraud practised on the original defendant, it would have been open to the answer already made to the fourth and sixth pleas: but, as it alleges fraud and collusion between the plaintiff and the defendant in the action for the purpose of charging the present defendant, there was no opportunity for him to plead it before. We are of opinion that such fraud and collusion are sufficiently stated by the fifth plea: and the question of fact is thereby raised \*which is properly within the province of a jury to determine. We were reminded, on the argument, that, when such questions of fact have arisen on motion to set aside proceedings by scire facias on a similar judgment, we have directed issues to try the facts, rather than determine them ourselves on affidavit: Bosanquet v. Graham (4); which furnishes an additional argument to show that such facts may be pleaded, if there be the opportunity to do so.

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Upon the whole, therefore, we think that our judgment must be for the defendant on the fifth plea, and for the plaintiff upon the others.

Judgment for plaintiff on the third, fourth, and sixth pleas: for defendant on the fifth plea.

importance.—A. C.

<sup>(1) 11</sup> M. & W. 450.

<sup>(2) 2</sup> Man. & G. 760.

<sup>(3)</sup> The decision in both these cases turned upon points of formal pleading which have ceased to be of practical

<sup>(4)</sup> June 23, 1843, Lord Denman, Ch. J., Patteson & Williams, JJ.; and see Bosanquet v. Woodford, 64 R. R. 504 (5 Q. B. 310).

1814. Nov. 21. [ 606 ]

## YOUNG v. HICHENS (1).

6 Q. B. 606-612; S. C. D. & M. 592.)

Plaintiff, while fishing for pilchards, had nearly encompassed the fish with a net; but defendant, by rowing his boat to the opening, disturbed the fish and prevented the capture. Plaintiff brought trespass; and, issues being joined, 1, on plaintiff's possession of the fish: 2, on the fish being plaintiff's, in manner &c.: Held that he was not entitled to recover; no special custom of the fishery being proved.

In ordinary cases the Court will not grant leave to a plaintiff to discontinue, where a verdict has been found against him and is not special. Assuming that under peculiar circumstances the Court would grant such leave, they will not do so if there has been a delay, not sufficiently accounted for. As where a verdict for plaintiff was set aside on motion in Hilary Term, and the verdict entered for defendant, and the plaintiff moved in Trinity Term to discontinue, without any explanatory affidavit.

TRESPASS. The first count charged that defendant, with force &c., seized and disturbed a fishing sean and net of plaintiff, thrown into the sea for fish, wherein plaintiff had taken and inclosed, and then held inclosed in his own possession, a large number of fish, to wit &c., and that defendant threw another fishing sean and net within and upon plaintiff's sean and net, \*and for a long time, to wit &c., prevented plaintiff from taking the fish, so taken and inclosed, out of his sean and net, as he could otherwise have done; and drove &c. the fish; whereby part of them died, part were injured, and part escaped; and the sean and net was injured. Second count, that defendant with force &c., seized, took, and converted fish of plaintiff.

Pleas. 1. Not guilty. Issue thereon.

- 2. To the first count, as to preventing plaintiff from taking the fish alleged to be inclosed in his possession, and driving &c. the said fish: that the fish were not plaintiff's fish, and he was not possessed of them, in manner &c.: conclusion to the country. Issue thereon.
- 3. To the second count, that the fish were not the plaintiff's fish, in manner &c.: conclusion to the country. Issue thereon.
- 4 and 5. As to other parts of the declaration, raising defences under statutes 16 Geo. III. c. 36, and 4 & 5 Vict. c. lvii. (local and personal, public), relating to the St. Ives (Cornwall) pilchard fishery. Issues of fact were tendered and joined on those pleas.

On the trial, before Atcherley, Serjt., at the Cornwall Spring Assizes, 1843, it appeared that the plaintiff had drawn his net partially round the fish in question, leaving a space of about seven fathoms open, which he was about to close with a stop net; that two boats, belonging to the plaintiff, were stationed at the opening.

(1) Aberdeen Arctic Co. v. Sutter (1862) 4 McQ. 355; R. v. Revu Pothadu (1882) Ind. L. B. 5 Mad. 390.

[ \*607 ]

and splashing the water about, for the purpose of terrifying the fish from passing through the opening: and that, at this time, the defendant rowed his boat up to the opening, and the disturbance, and taking of the fish, complained of, took place. The learned Serjeant left to the jury the question of fact whether the fish \*were at that time in the plaintiff's possession, and also other questions of fact on the other issues. Verdict for plaintiff on all the issues, with damages separately assessed, namely, 568l. for the value of the fish, and 1l. for the damage done to the net. Leave was given to move as after mentioned. In Easter Term, 1843, Crowder obtained a rule nisi for entering a verdict for defendant on all the issues, or on the 2nd, 3rd, 4th, and 5th, or for reducing the damages to 20s. and entering a verdict for defendant on the 2nd and 3rd issues; or for a new trial; or for arresting the judgment. In Hilary vacation (February 10th), 1844,

Cockburn and Montague Smith showed cause:

The second and third issues raised questions of fact. The jury were justified in finding as they did, unless it be legally impossible for a man to have possession of a wild animal which is not in his actual occupation. On the motion for the rule, Bracton, f. 8 b. lib. 2, c. 1, s. 3, was cited. He says: "Item continet occupatio piscationem, venationem et apprehensionem. Et nec sola persequutio facit rem esse meam. Nam etsi feram bestiam vulneraverim ita ut capi possit, non tamen est mea nisi eam cepero, imo erit potius occupantis, quia multa accidere solent ne capiam." But there "occupatio" is not confined to corporal possession: a controul is sufficient. The doctrine appears to be taken from Just. Inst. lib. 2, tit. 1, s. 12, where the law is thus laid down. "Feræ igitur bestiæ, et volucres, et pisces, et omnia animalia, quæ mari, cælo et terrâ nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt." "Quicquid autem eorum ceperis, eousque tuum esse intelligitur, donec tuâ custodiâ coercetur." \*The last words are adopted in (1) the Digest, lib. 41, tit. 1, s. 3, § 2. The custodia is not to be construed strictly. In the Greenland whale fishery the custom regulates this. According to Littledale v. Scaith (2), recognized in Fennings v. Lord Grenville (3), the first striker of a whale does not acquire the property if the line break;

... nostrum ... nostra.—F. P.

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<sup>(1)</sup> Sic: but the learned counsel must have said or at least meant "from." The Digest reads ceperimus

<sup>(2) 9</sup> R. R. 762, n. (1 Taunt. 243, note (a)).

<sup>(3) 9</sup> R. R. 760 (1 Taunt. 241).

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and another party may then take the whale: but in Hogarth v. Jackson (1) the custom proved was that, if the fish remained entangled in the line, and the line in the power of the striker, although the harpoon was detached, the whale still was in the possession of the striker; and BEST, Ch. J. considered this a more reasonable custom than that stated in Littledale v. Scaith (2), if it were understood as extending "to all cases where the whale was so far entangled in the rope of the first strikers, that they might thereby have a reasonable expectation of securing her." BAYLEY, J., in Skinner v. Chapman (3), appears to have held, without reference to custom, that, if the fish be harpooned and the line attached, a party who causes the liberation of the fish cannot appropriate it. In Churchward v. Studdy (4) a question arose as to the time at which a hunted hare became the property of the hunter: but no decision was given, the fact turning out to be that the hare had been finally captured for the use of the hunter. In Bell's Principles of the Law of Scotland, p. 477, 4th ed., under the head of Occupancy, the principle is laid down as follows (s. 1289). "The act of appropriation is effectual to vest the property only when complete. it is held complete while fairly proceeding towards full accomplish-So, if \*one wound an animal to death, or so that it cannot ment. escape, or if one, without wounding it, have an animal in pursuit, and not beyond reach, another coming in and taking the animal does not deprive the first of his right—the first being deemed the lawful occupant. In whale-fishing, an important branch of national industry, this general principle is not found to answer all the exigencies of the situation; and particular rules are established." The author then refers to some Scotch authorities, and to the English authorities before cited; and to Stair's Inst., p. 199. 4th ed. Book 2, tit. 1, s. 33. Stair lays down the principle as follows. "It is the first seizure that introduceth property, and not the first attempt and prosecution; as he who pursueth or woundeth a wild beast, a fowl or fish, is not thereby proprietor, unless he had brought it within his power, as if he had killed it or wounded it to death, or otherwise given the effectual cause whereby it cannot use its native freedom; as at the whale-fishing at Greenland, he that woundeth a whale so that she cannot keep the sea for the smart of her wound, and so must needs come to land, is proprietor, and not

(3) Moo, & Mal. 59, n.

<sup>(1)</sup> Moo. & Mal. 58.

<sup>(2) 9</sup> R. R. 762, n. (1 Taunt. 243, (4) 12 R. R. 513 (14 East, 249).

note (a)).

he that lays first hand on her at land." It appears to result that a strong probability of complete capture is enough to give a right of possession against a party preventing the capture. If the net here had been completely closed, but there had been a fracture in it, a party could not have acquired a right to the fish by enticing it out of the net through the fracture, and then taking it. (They also argued on the statutes.)

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#### Crowder, contrà :

The authorities from the Roman law and Bracton are in favour of the defendant, because \*in this case there was neither capture, occupation nor custody. The cases as to the whale fishery, including Skinner v. Chapman (1), turned on the custom. The passage cited from Bell lays down a doctrine which cannot be recognized in an English Court, unless as it may prevail by custom in particular occupations, as the whale fishery. Blackstone (2) refers, for the law, to the passage cited from Bracton. (The argument as to the statutes is omitted.)

[ \*611 ]

Butt, on the same side, was not heard.

#### LORD DENMAN, Ch. J.:

It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant: but it is quite certain that he had not possession. Whatever interpretation may be put upon such terms as "custody" and "possession," the question will be whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish. It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining such power: but that would only show a wrongful act, for which he might be liable in a proper form of action.

## PATTESON, J.:

I do not see how we could support the affirmative of these issues upon the present evidence, unless we were prepared to hold that all but reducing into possession is the same as reducing into possession. Whether the plaintiff has any cause of action at all is not clear: possibly there may be a remedy under the statutes.

Young Wightman, J.:

t. Hichens. [612] I am of the same opinion. If the property in the fish was vested in the plaintiff by his partially inclosing them but leaving an opening in the nets, he would be entitled to maintain trover for

fish which escaped through that very opening.

(Coleridge, J. was absent.)

Rule absolute for reducing the damages to 20s., and entering the verdict for defendant on the second and third issues.

1844. Nov. 22. DOE D. JOHN LE KEUX v. HARRISON AND OTHERS (1).

(6 Q. B. 631-637; 14 L. J. Q. B. 77; 9 Jur. 104.)

The heir of copyhold lands not appearing on proclamation, the lord seized quousque. Afterwards the heir claimed; and, the lord declining to admit him, on the supposition that another party had title, the heir obtained a rule nisi for a mandamus to admit. On discussion of the rule, it was ordered, by consent of the heir and lord (no other party appearing), that an ejectment should be brought to try the right, the heir being lessor of the plaintiff, and the lord defendant; and that the rule for a mandamus should be enlarged in the mean time: and the parties agreed to waive technical objections on the trial.

The heir proved title; and the defendant put in a will of the ancestor, devising the lands to the London Annuity Society. No further evidence being given for the defendant, the Judge left the case to the jury on the proof of title in the lessor of the plaintiff; and the plaintiff had a verdict.

On motion to enter a nonsuit, cause being shown at the same time against the rule nist for a mandamus:

Held, that plaintiff was entitled to recover, for that the lord, though he had seized quousque, could not hold against the heir on the mere proof of a devise to parties who had not claimed admittance, and of whom nothing was known. Rule for a nonsuit discharged. Rule for a mandamus made absolute.

EJECTMENT for lands in Surrey. The action was brought under the following circumstances.

Richard Le Keux died in 1840, seised of the lands in question, which were copyhold of the manor of Old Paris Garden in Surrey, and to which he had been duly admitted. By his will, dated August 4th, 1837, he devised as follows: "I give for ever the whole of my landed property to the London Annuity Society, situate at Blackfriars Bridge, of which I was formerly a member: the

<sup>(1)</sup> Cited in Walters v. Webb (1869) L. R. 5 Ch. 531, 39 L. J. Ch. 677).— L. R. 9 Eq. 83, 90, 39 L. J. Ch. 414 (affd. A. C.

inclosed paper is an information of every thing concerning the estate; the other paper is an account of my funded property as it now stands. Be it further known the London Annuity Society do pay out of the proceeds of the said estate to Ann Cox, according to my late sister's will, the sum of 10l. a year for the care and support of sundry dumb animals living with her at the time of her death." The Society did not claim admittance, and were not admitted. Proclamations were made for the heir of Richard Le Keux: and, no one appearing on the third proclamation, the defendants, the \*lords of the manor, seized quousque. Afterwards, the lessor of the plaintiff demanded admittance as heir-at-law; and, the lords not granting it, he obtained a rule nisi for a mandamus commanding them to admit. The lords, on June 12th, 1844, showed cause against the rule. No one appeared for the Annuity Society. Court, by consent of the parties appearing, ordered that an action of ejectment should be brought, the party claiming as heir to be lessor of the plaintiff, and the lords defendants; and that the rule for a mandamus should be enlarged until after the trial: and it was agreed between the parties that, in trying the cause, no technical objections should be taken.

objections should be taken.

On the trial, before Parke, B., at the Guildford Summer Assizes, 1844, evidence was given to show that the lessor of the plaintiff was the heir-at-law of Richard Le Keux. The defendants' counsel, in answer, put in the will of Richard (the execution of which was admitted), but offered no further evidence. It was objected, on behalf of the plaintiff, that the will, without proof of any devisee having been admitted, could have no effect; and Parke, B. was of this opinion. For the defendants it was urged that the agreement to waive technical objections excluded this: but the learned Judge held that he could not avoid noticing it. He reserved leave to move to enter a nonsuit, and left to the jury, as the only question for them, whether the lessor of the plaintiff had made out his pedigree. Verdict for plaintiff.

Gurney, in this Term, obtained a rule to show cause why a nonsuit should not be entered; and the Court said that, when cause was shown, they would also hear the further discussion of the rule nisi for a mandamus.

Platt and Peacock now showed cause against the rule nisi for entering a nonsuit, and supported the rule nisi for a mandamus.

Doe d. Le Keux v. Harrison.

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DOE d. LE KEUX r. . HABRISON.

[ \*634 ]

brought (5).

On the death of a copyholder, his heir is legally entitled to a mandamus to enforce admittance: Rex v. The Brewers' Company in. Rex v. The Lord of the Manor of Bonsall (2): and it was so held in Rex v. Wilson (3), where the copyholder had devised the land, but the devisees disclaimed. Lord TENTERDEN said there: "By the common law a copyhold estate in fee, after surrender, remains in the surrenderor and his heirs until the surrenderee comes in and is admitted. Here the devisees were the surrenderees, and on the death of the testator the estate descended to his heir, subject to the right of the devisees to be admitted. When they declared that they would not come in, the obstruction that stood in the way of the present right of the heir was removed." The authorities are collected in 1 Scriv. Cop. 357, 626, 627 (3rd ed.). That the devisees have never claimed admittance is not a mere technical objection. The heir-at-law, even without admittance, may maintain ejectment against a stranger; a devisee, not admitted, has no legal title, and could not, therefore, resist such an ejectment. The defence here is, substantially, that of the lord; and the question is, whether he can keep the heir out till a devisee claims. The admission of the heir, in this case, can be no injury to the lord; if the devisees should present themselves hereafter, he is not prejudiced. Doe d. Burrell v. Bellamy (4) shows that, if the heir is entitled to admittance, but the lord has withheld it and \*seized the land, a defendant in ejectment brought by the heir cannot avail himself of the state of things created by the lord's own wrongful act. Further, it was not proved at the trial that the London Annuity Society was a body competent to take by devise, or even existing when the action was

Sir F. Thesiger, Solicitor-General, and Gurney, contrà:

The question must mainly turn upon the agreement on which the parties went to trial. The non-admittance of the devisees, as well as that of the heir, was a technical point which, by the previous understanding, could not be raised. The defendants do not dispute that a party proved to be entitled as heir may demand admittance:

<sup>(1) 27</sup> B. B. 318 (3 B. & C. 172). And see Rex v. The Lord of the Manor of Hexham, 44 B. B. 496 (5 Ad. & El. 559).

<sup>(2) 27</sup> B. B. 319 (3 B. & C. 173).

<sup>(3) 34</sup> R. R. 327 (10 B. & C. 80).

<sup>(4) 14</sup> R. R. 595 (2 M. & S. 87).

<sup>(5)</sup> With regard to this, and some other parts of the case, the affidavits used on the motion for a mandamus were referred to: but it is not thought necessary to notice these more particularly.

but the lord is entitled to ascertain who really is the proper tenant, and may dispute the heir's claim if there be ground for so doing; as if it appear that there is a devisee who ought to be admitted, though he may not have claimed admittance. Whatever might be the case if the lord had not seized, yet, after having done so, he is not so entirely an uninterested party that he can reasonably be required to allow the heir's title as against himself upon mere demand. Doe d. Burrell v. Bellamy (1) is no authority as to the general law: there the lord had seized and demised the lands, no heir appearing on proclamation: after the lapse of years the heir claimed admittance: the steward declined giving it in the lord's absence; and, the heir, under these circumstances, having obtained a verdict in ejectment against the lord and his tenant, the Court merely refused \*a rule to show cause why that verdict should not The ground of motion was that the heir should have tendered himself for admittance at the lord's Court; and the only observation reported, on the refusal of the rule, is, that what had been said by the steward was a dispensation with such attendance. According to the argument for the lessor of the plaintiff in this case, he cannot be entitled to a mandamus; for he may enforce all his rights by the common course of law.

Doe d. Le Keux

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(Coleridge, J.: Rex v. The Brewers' Company (2) answers that observation.)

The issue in the present action was substituted for an issue on a traverse of the return to a mandamus; every point of which the defendants could have taken advantage on such traverse should be available to them now. As to the existence of the Society, the affidavits on the motion for a mandamus sufficiently proved it; and the Court will not presume that they were a body incompetent to take, or that the devise was void within the Statute of Mortmain, 9 Geo. II. c. 36.

(Coleridge, J.: They might exist: but it ought to have been shown whether they were a corporation, or a body formed under a trust deed, or in what other manner they might be able to take land; especially as the will was made so long ago as 1837, and no claimant under it has appeared.)

Suppose the words of devise had been "to John Smith, who formerly

(1) 14 R, R. 595 (2 M. & S. 87).

(2) 27 R. R. 318 (3 B, & C. 172).

Doe d. Le Keux v. Habrison. lived in my service, and his heirs:" it might reasonably have been presumed that such a person existed, and might prefer a claim. And here the description is more precise: "the London Annuity Society, situate at Blackfriars Bridge."

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(Wightman, J.: It does not appear that they \*were persons who could take land.

COLERIDGE, J.: You did not go far enough in proof. This was matter of substance.)

The objection, at the trial, was not raised in this form, but turned wholly on the want of admittance. The difficulty now suggested could have been removed by evidence.

(LORD DENMAN, Ch. J.: It would not have been sufficient, unless you could have shown a claim made. The lord is not to seize and hold the land against the heir, without showing that some person has claimed adversely. This was taken for granted in *Doe* d. *Burrell* v. *Bellamy* (1). It is clear, on principle, that, if proclamation is made, and the land seized till the heir comes in, and the heir afterwards does come, the lord cannot answer his claim by saying that parties who have not appeared are entitled.)

At all events, the heir cannot succeed both in an action and on mandamus.

(LORD DENMAN, Ch. J.: Perhaps a feigned issue would have been a more proper mode of trying the cause than an ejectment; but this course was better for you, because it enabled you to set up any claim adverse to that of the lessor of the plaintiff, though you have not done so.

WIGHTMAN, J.: No one else claiming, the lessor of the plaintiff is entitled to admittance.)

The defendants may be compelled to pay mesne profits twice, if the devisees should come in hereafter.

## LORD DENMAN, Ch. J.:

There is no doubt in this case. The plaintiff proved his title; and nothing was stated in evidence against it: he was therefore

entitled to succeed in the action. And he is entitled to a mandamus, because he is the heir, and there is no adverse title to prevent his admittance.

Doe d. Le Keux v. Harrison.

WILLIAMS, J. concurred.

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#### COLERIDGE, J.:

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The seizure quousque makes no difference in the right of the heir. The lord seizes only till the tenant comes in: that seizure does not give him any adverse title.

WIGHTMAN, J. concurred.

Rule nisi for entering a nonsuit discharged. Rule absolute for a mandamus.

# SIR R. DOBSON AND JOHN SUTTON v. GROVES AND OTHERS (1).

1844. *Nor*. 23.

[ 637 ]

REG. v. SIR RICHARD DOBSON, JOHN SUTTON

(6 Q. B. 637-648; S. C. 14 L. J. Q. B. 17.)

Where an arbitrator questions a witness and receives statements from him in the absence, and without the consent, of one party to the reference, the Court will set the award aside, without taking into consideration the nature of the statements or the probability of their having influenced the decision.

G. indicted D. for a nuisance committed by erecting a fixed pier in the bed of the Thames. D. brought an action against G. for disturbing his right of waterway near the same place, by placing barges, &c., which formed a floating pier. Both cases were referred to an arbitrator. After hearing and dismissing the parties, the arbitrator sent for a deputy water-bailiff, who had been examined on the reference, and questioned him as to the means of giving convenient access to the shore, supposing the fixed pier to be removed. Neither party to the reference appeared at or had notice of the meeting; a special pleader, who had been employed on the reference as advocate, was present, but not professionally. The party who afterwards complained of this proceeding had notice of it four days before the arbitrator made his awards, but did not remonstrate.

By his award on the indictment, the arbitrator directed a verdict of Guilty to be entered, and the fixed pier removed; by his award in the action he ordered a verdict to be entered for the defendants on the issue upon Not guilty, and on certain other issues, and for the plaintiffs on the residue, and directed that, when the fixed pier should have been removed

<sup>(1)</sup> Cited in Moseley v. Simpson (1873) L. R. 16 Eq. 226, 234, 42 L. J. Ch. 739.—A. C

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as ordered by the other award, the defendants should place their barges according to certain specified regulations.

Held that, by reason of the irregularity, no part of the award in either case could stand.

And, on motion to set the awards aside, that the omission to remonstrate after knowledge of the irregularity, and before making of the awards, was no answer.

In Dobson v. Groves, the plaintiffs sued for an injury done to their reversionary right by placing barges, timbers, &c., on the river Thames, near to a messuage and premises occupied by one Chappell as tenant to \*the plaintiffs (1), and thereby obstructing the access and navigation to the said premises. The defendants pleaded Not guilty, and other pleas; on which issues were joined.

In Reg. v. Dobson the defendants were indicted for a nuisance committed by making and continuing an embankment in the river Thames, at the parish of St. Alphage, Greenwich, whereby the navigation was obstructed. Plea, Not guilty (2).

The cause of *Dobson* v. *Groves*, coming on for trial at the Maidstone Spring Assizes, 1844, was referred, as was also the indictment, to a barrister, verdicts being taken for the plaintiffs and for the Crown, subject to the awards respectively. Power was given to the arbitrator in both cases to order removal of obstructions; and, in the action, to regulate the waterway to, from and in front of the premises of plaintiffs and their tenants. The arbitrator, in last Trinity vacation, made and published his awards.

Badeley, in this Term, obtained rules to show cause why the awards should not be set aside on the ground of irregularity on the part of the arbitrator in holding meetings with the defendants in the action (prosecutors of the indictment), their counsel and attorney, and one of their witnesses, in the absence of the opposite parties or their attorney (3). The material facts stated on \*affidavit in support of the applications respectively were as follows.

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The arbitrator held several meetings on the references respectively, attended by counsel and attorneys on each side, and by a

- (1) There were several counts, naming other tenants, and one laying the interrupted right in the plaintiffs themselves.
- (2) The proceedings arose out of disputes between two rival Packet Companies, one of which landed and embarked passengers at a fixed pier
- (the embankment mentioned in the indictment) at Greenwich, and the other used, for the same purpose. 2 floating pier, the obstruction complained of in the action.
- (3) The rule in the action was obtained on some additional grounds, which it is unnecessary to state.

special pleader under the Bar on behalf of the prosecutors of the indictment and defendants in the action. At a meeting held, September 30th, on the matters of the indictment, the attorneys and special pleader being present, but no counsel, the arbitrator enquired of the defendants' attorney if he meant to call Mr. Peirce, the under water-bailiff of the city of London. replied that he did not; and the arbitrator then put the same question to the attorney for the prosecution, who likewise declined calling him, assigning, as a reason, that the evidence Mr. Peirce would be called upon to give might prejudice him with his The arbitrator then said that he should himself examine Mr. Peirce, and appointed a meeting for the purpose on the following day at Greenwich. At that meeting (October 1st), the arbitrator examined Mr. Peirce, but refused to allow the defendants' attorney (counsel being still absent) to cross-examine. The case in respect of the indictment was then brought to a close; and the arbitrator said that he wanted nothing further from either party; that he intended leaving town in a week, and that he should first make his awards. The attorney for the defendants on the indictment and for the plaintiffs in the action deposed that he never received any further notice or appointment from the arbitrator of any meeting in regard to either of the references, nor did he know of any meeting that was to take place; that he neither attended, nor authorized any person to attend, any subsequent meeting; and that any such meeting at \*which either counsel, special pleader or attorney for the prosecutors of the indictment or defendants in the action was present took place without his knowledge. On the 3rd of October, Mr. Sutton, one of the plaintiffs in the action and defendants to the indictment, who had attended the meeting of October 1st, went, on business unconnected with the arbitration, to the "Ship" Tavern at Greenwich, where the meeting of October 1st had been held. He was there told that the arbitrator and other parties were in the house; and, going into the room in which the former meeting had taken place, the found there the arbitrator, the special pleader who had attended for the prosecution, and the witness Peirce, perusing papers and plans connected with the matters of the arbitration. Sutton observed to the arbitrator that he had not been aware there was to be a meeting on that day, and did not think that his attorney knew it. The arbitrator replied that he did not expect to see the defendants' attorney. Sutton then said that he supposed there would be no objection to

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his remaining, as the special pleader for the prosecution was present. The arbitrator said that he had the special pleader there to give him some information, by which, however, his opinion would not be biassed; and he refused to allow Sutton to remain. withdrew, leaving the other three parties together, and forthwith called at the office of his attorney, and reduced into writing what had passed. He was afterwards informed that the meeting at the "Ship" Tavern lasted nearly two hours (1). On the \*7th of October the arbitrator made his awards, directing, as to the indictment, that a verdict of Guilty should be entered against three of the defendants, and of Not guilty as to one, and that the embankment should be removed with all reasonable speed. to the action directed that a verdict should be entered for the defendants on some of the issues (including that on the plea of Not guilty), and for the plaintiffs on the rest; that, as soon as the embankment should have been removed as directed by the other award, the defendants in the action should to a certain extent (which was described), remove their barges &c., and that the future placing and use of barges &c. by them near the premises mentioned in the declaration should be subject to regulations laid down in this award, and the object of which was that passengers might be landed from steam boats as they had previously been by means of the barges, &c. complained of in the action, but without material inconvenience to the adjoining premises. A plan was annexed.

In opposition to the rule, the attorney for the prosecutors and for the defendants in the action deposed, as to the examination of Peirce, that the water-bailiff, who gave evidence for the defendants on the indictment, had stated, as to certain questions, that Mr. Peirce, his deputy, could best answer them; and the arbitrator, referring to this statement, had asked the attorneys, respectively, whether they would call Peirce: that, on their declining to do so, the arbitrator said he thought it his duty to hear what Peirce could state, and should therefore call him, but that the parties, if they declined calling the witness, should not be at liberty to cross-examine him; that the arbitrator examined Peirce accordingly, \*not permitting cross-examination by the attorneys, but allowing some questions to be put by Sutton in writing handed to the

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dicted by the affidavits in answer, and were not relied upon in the judgment of the Court, they are omitted here.

<sup>(1)</sup> Other facts were alleged, impeaching the conduct of the arbitrator; but, as they were explained or contra-

arbitrator himself; that the present deponent did not, after October 1st, either by himself or any other person, attend any meeting before the arbitrator, or instruct any counsel or special pleader to attend before him, nor did he know that the meeting spoken of by Sutton was about to take place; and that neither he nor his clients took any part in it, nor did he pay any fee or costs in respect of such meeting. The deponent also testified to the diligence and impartiality of the arbitrator throughout the proceedings.

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Peirce made an affidavit, stating that, after his examination on 1st October, the arbitrator asked him, at the door of the room, if he could give any plan or suggestion by which, if the embankment were taken away, the accommodation of steam boat passengers, and passengers using row boats and wherries, could be secured, so as at the same time to secure a right of waterway to the "Salutation" Inn and certain other houses; when the deponent answered, that he thought he could; and thereupon the arbitrator requested him to attend with such a plan or sketch on 3rd October then next; that he did so, and produced a small pencil sketch or plan to the arbitrator, who asked him questions respecting it, but did not take down anything in writing: that no person but the deponent and the arbitrator was present at this interview, except, for about a minute, the deponent Sutton, and except, during part of the interview, the gentleman who had before attended as special pleader, and who resided at Greenwich, but was then unknown to the deponent: and that this latter gentleman took no note of the conversation, nor part in \*it, except that he might have made some casual observation. The deponent further stated that no communication took place between the arbitrator and himself on the matters respecting which he had been examined, except so far as was necessary for the explanation of the plan, which explanation did not occupy more than twenty minutes; that the rest of their conversation turned upon matters not in any way relating either to the plan or to the matters of the arbitration; and that no communication on the subject of the reference took place between them after that meeting.

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The attorney for the prosecutors and for the defendants in the action made a second affidavit, stating that, after the present rules had been obtained, he wrote to the arbitrator, requesting him to explain the facts alleged on moving for the rules, as to the meeting with Peirce and the special pleader on the 3rd October; and

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enquiring whether the arbitrator would be willing to state, on affidavit, the circumstances and purpose of such meeting. sent a similar letter to the special pleader. The arbitrator wrote in answer: "I very deeply regret I cannot comply with either of your requests. I feel an intense anxiety to explain under what circumstances, and for what purpose, I saw e: ther of those gentlemen on the day you name; but I consider it would be improper in me to give any such explanation to any of the parties concerned. The Court have the power, if they think fit, of calling upon me for an explanation; and I shall be rejoiced if they will afford me the opportunity of giving it: and, that they may not be disappointed, I will make it my object to be in Court ready to give any information which may be called for by them, if you will let me know the day on which it is \*arranged to dispose of these rules." The special pleader answered that he felt obliged, though reluctantly, to decline making an affidavit: he expressed his conviction that, if the truth could be known, no objection could be made to that which took place; but he added that, although he was not engaged professionally in the reference after the case closed on 1st October, 1844, and was not present, or acting, on the 3rd, on behalf of the prosecutors or their attorney, yet, having taken part in the reference as advocate before and on the 1st October. he was advised that he could not, consistently with professional etiquette, make any statement on affidavit connected with the case.

Platt, C. C. Jones, Serjt., M. Chambers and Hugh Hill now showed cause against the rules:

The conference of October 3rd was not a meeting, but an interview merely between the arbitrator and a person who had in the first instance been sent for by him, and was not the witness (as he is termed in the rule) of either party. The arbitrator, if he had not called in Peirce, must probably have obtained the advice of some scientific person on the point as to which Peirce was consulted; and it would have made no difference whether such person had been previously examined or not. If the arbitrator had taken the advice of a professional friend in shaping his award, no one could have disputed it on that account. A person appointed as referee to fix the value of an estate "may make use of the judgment of another upon whom he can depend; and the valuation of that person is his, if he chooses to adopt it." [They cited Emery v.

Wase (1), Anderson v. Wallace (2), Atkinson v. Abraham (3), and Bignall v. Gale (4).] Whatever may be the effect of the alleged irregularity, it cannot vitiate the awards altogether. Mr. Peirce's affidavit points out distinctly the subject to which alone the enquiry of October 3rd was directed, namely, the manner in which, after removal of the embankment, accommodation might be given to passengers embarking in and disembarking from \*steam boats, or using row boats and wherries, without prejudice to certain rights of waterway. The award in Dobson v. Groves, so far as it regards that point, may be set aside for excess of authority, and the rest of the adjudication stand: Manser v. Heaver (5).

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## M. D. Hill (with whom were W. H. Watson, Bodkin and Badeley), contrà:

The irregularity was so great that it vitiates all the proceedings. The arbitrator did wrong, not only by conferring with a witness in the absence of the parties, but by allowing a person to be present who had attended him as advocate. If that gentleman was still an advocate, the impropriety is manifest: if he was not, he might now make an affidavit. In Walker v. Frobisher (6), where the arbitrator, after saying that he would examine no more witnesses. heard witnesses on the side of one party, no person attending for the other, Lord Eldon set aside the award. The arbitrator there made affidavit that the statements of these witnesses had not had the least weight with him; but the LORD CHANCELLOR, though he gave credit to the statement, and admitted the respectability of the arbitrator, said that he had "been surprised into a conduct; which upon general principles must be fatal to the award:" and that "a Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind." And in the later case of Fetherstone v. Cooper (7) he adhered to that decision. (Hill was then stopped by the Court.)

#### LORD DENMAN, Ch. J.:

An important principle is involved in this application. When the rule was moved \*for, no imputation was cast upon the motives of the arbitrator; but the facts stated threw great doubt on the validity of the award. It has been ingeniously argued that we

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<sup>(1) 7</sup> R. R. 109 (5 Ves. 846, 848). See Emery v. Wase, 8 Ves. 505.

<sup>(2) 3</sup> Cl. & Fin. 26.

<sup>(3) 1</sup> Bos. & P. 175.

<sup>(4) 58</sup> R. R. 583 (2 Man. & G. 830).

<sup>(5) 37</sup> R. R. 426 (3 B. & Ad. 295).

<sup>(6) 5</sup> R. R. 223 (6 Ves. 70).

<sup>(7) 9</sup> Ves. 67.

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may get rid of the difficulty by limiting the effect of the objection to certain points only; but I think that cannot be done in the present case. It is clear that the arbitrator held a meeting on the 3rd of October for the purpose of making up his mind on one of the subjects referred; and a gentleman was present who had acted as advocate in a former stage of the reference. The arbitrator said that nothing which passed on that meeting would influence his decision: but I think that no information ought to be received at all under such circumstances, unless the arbitrator has an express power reserved for that purpose, or the parties agree that he shall exercise it. The proceeding is quite different from that of consulting a legal friend on the framing of the award; that is legitimate: but here the conference is on something to be done by the consulting party, as arbitrator, on the matters referred: it turns upon a point in the cause on which a bias may be given to his mind without the possibility of its being removed. The only difficulty arises from the two cases in the Common Pleas: and I will say, without disguise, that I would rather abide by the principle which Lord Eldon lays down in Walker v. Frobisher (1) than by those decisions. It seems that in Atkinson v. Abraham (2) the opinion cited before us was not felt to be quite satisfactory; for the LORD CHIEF JUSTICE added: "Besides, this seems a matter of too little consequence to be opened again." I think that on this subject we can draw no line, but must abide by the \*general principle, and oppose all attempts to explain by the bearing of particular parcels of evidence whether the enquiry had, or by any probability might have had, an effect upon the arbitrator's decision. I make no observation on the want of evidence from the gentleman who attended as special pleader; which evidence it does not appear that he might not have given. When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection. suggested that the complaining parties waived their right to object by not protesting before the award was made. Where an irregularity takes place at a meeting of all the parties, and is passed over. that observation may apply. But, where a party wishing to be present has been excluded from the meeting, the opportunity of setting right what was irregular is past. The mischief was done

(1) 5 R. R. 223 (6 Ves. 70). See Term (January 29th), post, p. 572. In re Plews and Middleton, Hilary (2) 1 Bos. & P. 175.

at the time, and cannot be removed.

Platt then suggested that the present decision would, at least, not affect the award upon the indictment.

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Groves.

LORD DENMAN, Ch. J.:

We cannot make any distinction. It is all one subject-matter.

WILLIAMS and COLERIDGE, JJ. concurred (1).

Rules absolute (2).

## REG. v. THE COMMISSIONERS OF STAMPS AND TAXES.

(6 Q. B. 657-662.)

1844. Nov. 23.

By an instrument purporting to be the will of S. deceased, the whole of S.'s personalty, amounting in the net to 12,748l., was bequeathed to J., a stranger in blood, who was made executor. J. took out probate, and paid the duty of 10 per cent. on the whole net. Afterwards T., the next of kin to S., disputed the will, on the ground that S. was not of disposing mind. J. paid 6,000l. to T., and consented that the will should be revoked, and administration taken out by T., who, in consideration thereof, released to J. her claim on the 12,748l. T., from her nearness in blood, was liable to a duty of less than 10 per cent.

Held that, under the Legacy Duty Act, 1796 (36 Geo. III. c. 52), s. 37, J. was entitled to a return of duty, not only on the 6,000l., but also on the remaining 6,748l., and that the duty on the whole 12,748l. was to be accounted for between T. and the Commissioners of Stamps, as duty charged on T., at the lower rate.

KELLY, in last Term, obtained a rule calling on her Majesty's Commissioners of Stamps and Taxes to show cause why a mandamus should not issue, commanding them to repay to William Jackson, Lyon Falkener and Joseph Tredgett the sum of 1,274l. 17s. 9d., out of any monies in their hands arising from the duties imposed by stat. 36 Geo. III. c. 52, or the former Acts therein recited, or to allow that sum in account with Katherine Mary Tavener, administratrix of John Stracey deceased, and to deem the same payments in due course of administration by her, and to pay any surplus of the said sum, remaining after such allowance, to the said William Jackson, Lyon Falkener and Joseph Tredgett.

- (1) Wightman, J. was in the Bail Court.
- (2) In Hilary Term, January 11th, 1845, a rule was obtained calling on the defendants in the indictment to show cause why a new trial should not be had, unless they would consent that this prosecution and the action, Dobson v. Groves, should be referred to another arbitrator; and why the costs

of the first trial of the indictment should not abide the event of the second. In the same Term, January 31st, the rule was discharged, the defendants agreeing and undertaking to be bound by the verdict of Guilty, as if the same had been adversely obtained. In Trinity Term, June 12th, 1845, the defendants received judgment.

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By the affidavits on which the rule was obtained the following facts appeared. On 31st July, 1839, John Stracey died, possessed of real property in Cambridgeshire, of the value of about 2,500l. and of personal property to the amount of about 13,000l. By an instrument, purporting to be his will, all his real and personal property was given and bequeathed to Jackson, Falkener and Tredgett, their heirs, executors and assigns: and the three were appointed executors. They proved the will in the Prerogative Court of Canterbury, swearing the personal property to be under 14,000l. About 3rd April, 1841, they carried in their residuary account, showing a net \*amount of personalty of 12,748l. 17s. 9d.; and, being strangers in blood to the deceased, they paid, as ten per cent. (1) on this residue, 1,274l. 17s. 9d. to the Commissioners of Stamps and Taxes. Afterwards, Henry William Wilson, the heirat-law of John Stracey, brought ejectment against Jackson, Falkener and Tredgett, for the real estate of the deceased. action was tried at the Cambridgeshire Spring Assizes, 1843; when evidence was given, on the part of the plaintiff, to show that John Stracey was not of sound mind at the time of executing the alleged will; and the jury thereupon found a verdict for the plaintiff. A rule nisi for a new trial was obtained in the Easter Term following, on points unconnected with the question of Stracey's state of mind; which rule had been since abandoned. In March, 1843, Katherine Mary Tavener, the next of kin to Stracey, caused a citation to be issued out of the Prerogative Court of Canterbury against Jackson, Falkener and Tredgett, calling upon them to bring in the probate of the alleged will, and to show cause why such probate should not be revoked and administration granted to the next of kin. On 3rd June, 1848, the probate was revoked by the Prerogative Court; and, on 9th June, 1843, administration was granted to K. M. Tavener. After the commencement of these proceedings by K. M. Tavener, and before the revocation of the probate, certain agreements were made between K. M. Tavener and her husband, and Jackson, Falkener and Tredgett, the effect of which was that the probate should be revoked and K. M. Tavener take out administration, that 6,100l. should be paid by Jackson, Falkener and Tredgett to \*K. M. Tavener, and that they should also assign to her all the monies paid by them on account of legacy or probate duty; and

[ \*659 ]

release and discharge Jackson, Falkener and Tredgett from the
(1) Stat. 55 Geo. III. c. 184, Sched. part III.

that she and her husband, in consideration thereof, should acquit,

sum of 12,748l. 17s. 9d. returned by them as the residuary estate of J. Stracey; all of which was accordingly done. Wilson also gave up his claim on the real estate, for the sum of 2,350l. Afterwards, Jackson, Falkener and Tredgett applied to the Commissioners of Stamps and Taxes for a return of the 1,274l. 17s. 9d.; but the Commissioners refused to return more than 610l., being ten per cent. on the 6,100l. paid by Jackson, Falkener and Tredgett to K. M. Tayener (1).

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(1) Stat. 36 Geo. III. c. 52, s. 23, enacts "That where any legacy, or part of any legacy, or residue or part of residue, whereon any duty shall be chargeable by this Act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released consideration, or compounded for less than the amount or value thereof, then and in such case, the duty shall be charged and paid in respect of such legacy, or part of legacy, or residue, or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same: provided always, that if any legacy or bequest shall be made in satisfaction of any other legacy, or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty."

[ \*660, n. ]

Sect. 34 enacts, "That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the said Commissioners of Stamp Duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over payment of duty, to settle \*and adjust the amount of such over payment, and to repay the same out of the money in their hands, arising from the duties by this Act imposed, or to allow the same in future payments as the case may permit or require."

Sect. 37 enacts, "That if the authority under or by colour of which any person shall have administered the estate or effects of any person deceased. or any part thereof, shall be void, or be repealed, or declared void, and such person shall, before the avoidance, repeal, or declaration of avoidance. have paid any duty hereby imposed, or any duty imposed by any of the said former Acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said Commissioners of Stamp Duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said Commissioners, out of any monies in their hands arising from the duties imposed by this Act, or the said former Acts; but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case the payment of such duty shall be valid and effectual avoidance. notwithstanding such repeal, or declaration of avoidance as REG. v. COMMIS-SIONERS OF STAMPS.

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Sir F. Thesiger, Solicitor-General, and Crompton now showed cause:

The question is, whether the Commissioners are bound to take the whole duty from the administratrix, or are entitled to keep the duty paid by the parties named executors on so much as they have retained. The administratrix, by reason of her consanguinity (1). will pay less than 10 per cent.; and the Commissioners are advised that the utmost that can be contended for is, that the duty paid on the sum actually \*handed over to her should be returned to the parties who paid it, and the administratrix charged in respect of such sum. The question turns upon stat. 36 Geo. III. c. 52: and the only sections which can be important are 23, 34, and 37. Now sect. 37 is not applicable, because the authority under which the money was paid to the Commissioners is not avoided: it was paid under the will; the probate is revoked; but that does not avoid the will. The Commissioners have treated this as either a release or composition under sect. 23, or a refunding under sect. 34: and it is very doubtful whether they did not give up too much in doing so. But, admitting that, upon a liberal construction, the case might be brought within the equity of either of those sections, the claim for repayment can be applicable only so far as the composition or refunding has taken place. As to what the parties named in the will retain, they clearly cannot contend that the will is void; for that would be setting up their own wrong. And legatees, strangers in blood, might always defraud the revenue, by allowing a near relative to set aside the will upon terms and take out administration, and then insisting that the whole duty was to be charged only as against the party taking out administration.

Kelly (with whom was Gunning), contrà :

The case is within the thirty-seventh section. The parties paid as executors; their authority as executors is avoided by the revocation of the probate and the grant of administration to the

aforesaid; and no such person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority, be sued, molested, or troubled for or in respect of such payment; but all such payments, in respect of the said duty, shall be allowed in account with such rightful executor or executors, administrator or administrators, and the same shall be deemed payments in

the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators; any law. usage, or custom, to the contrary notwithstanding."

 In the ecclesiastical proceedings, she was styled cousin german, once removed, of Stracey.

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next of kin. The sum which they retain is not held by them under the will: it was the property of the next of kin, who, however, choose to give up so much rather than incur the risk and expense of litigation. \*It is either a gift, or the price paid for the compromise: but on neither view can the parties who now hold it be liable upon it as for a legacy. On the other hand, the administratrix must pay, not only on the sum which she has retained, but on all the net estate, including that which she has allowed the other parties to retain. A balance therefore is due from the Commissioners, on account of the difference of duties; which they may satisfy by any of the modes suggested in this rule. It is true that, if such an arrangement were fraudulent or collusive, the claim would not be allowed: but that is not suggested; and indeed the facts negative such a supposition. If there were any doubt, that construction would be least favoured which imposes a tax on the subject. (He was then stopped by the Court.)

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#### Per Curiam (1):

We think the case is within sect. 37. Probably it will not be necessary to make the rule absolute.

The Solicitor-General assented.

## IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

# REG. v. THE GOVERNORS OF THE DARLINGTON FREE GRAMMAR SCHOOL (2).

(6 Q. B. 682-719; S. C. 14 L. J. Q. B. 67.)

Queen Elizabeth, by charter, founded and endowed a grammar school at D., and incorporated certain persons and their successors as governors, and granted to them, for ever, full power and authority from time to time of electing, nominating and appointing a master and usher of the said school so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the same master or usher from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or steads.

Held by the Court of Queen's Bench, and by the Court of Exchequer Chamber, affirming their judgment, that, by the terms of the charter, the

- (1) Lord Denman, Ch. J., WILLIAMS and COLERIDGE, JJ.
- (2) Cited, Wildes v. Russell (1866) L. R. 1 C. P. 722, 744, 35 L. J. M. C. 241; Hayman v. Governors of Rugby

School (1874) L. R. 18 Eq. 28, 72, 43 L. J. Ch. 834; Abergavenny v. Bishop of Llandaff (1887) 20 Q. B. D. 460, 473; Guest Dean v. Bennett (1870) L. R. 6 Ch. 489, 490, 40 L. J. Ch. 452.—A. C. 1844, June 24, Nov. 26,

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governors might in their discretion remove a master without summons or hearing, and although no charge against him had been exhibited to them.

The governors were empowered by the charter to make bye-laws, and in 1748, they enacted a bye-law, requiring certain qualifications in the future masters, and ordaining (for the encouragement of well-qualified persons to accept the office) that no master should thereafter be displaced removed or removeable from the office unless some sufficient cause of complaint should be exhibited in writing against such master, and signed by the governors or their successors, and the same cause of complaint be first allowed of and declared by them to be a sufficient cause.

Held by both Courts that the governors had no right thus to limit the discretion given by the charter, and that the bye-law was void.

To a mandamus requiring the governors to restore a master whom they had dismissed, and alleging that he had always behaved himself well &c., the governors made return, stating the charter, and averring that the prosecutor did not always behave himself well &c., and that they received complaints from parents of the scholars, namely from A. B. and C. D., of the prosecutor's misconduct and inattention, and particularly that &c. (specifying complaints made by A. B. of particular acts of misconduct': that the governors gave the prosecutor notice of the complaints, and called upon him to answer, which (after having reasonable time and opportunity) he failed to do; and that the governors, being satisfied of the truth of the charges, in the exercise of their best discretion, and deeming the prosecutor an unfit person to be master, discharged him. Prosecutor took several traverses, denying that he had committed the acts charged, or that he had reasonable time &c. to answer. He also pleaded the above bye-law. and that no sufficient cause of complaint, exhibited in writing, was, before his dismissal, allowed according to the said law. The governors joined issue on the traverses, and replied to the plea, stating acts of misconduct, notice thereof to the governors, complaint in writing exhibited by them setting forth the causes, which were sufficient for dismissal, delivery of the written complaint to prosecutor, omission by him to answer though he had reasonable time and opportunity, allowance of the charges by the governors. and dismissal thereon. Rejoinder, denying that a complaint in writing. stating sufficient cause, was delivered to prosecutor, or allowed by the governors. Issue thereon.

A verdict being found for the Crown on all the issues, the Court of Queen's Bench gave judgment for the defendants non obstants veredicte.

Held by the Court of Exchequer Chamber that, under stat. 9 Ann. c. 20. s. 2 (1) (and consequently under stat. 1 Will. IV. c. 21, s. 3 (3)), judgment were obstante veredicto may be given for the party making return to a mandamus, and that it was rightly given here.

Quære, by the Court of Exchequer Chamber, whether, in other cases than that of mandamus, judgment non obstante veredicto may be given for a defendant as well as for a plaintiff. Semble, per PARKE, B., that it may.

MANDAMUS, directed to the Governors of the Free Grammar School of Queen Elizabeth within the town or village of Darlington, in the county palatine \*of Durham. The writ recited, in the usual form, that George Wray, clerk, "was duly qualified for, and duly elected, nominated, appointed, licensed, allowed and admitted to and into the place and office of upper

(1) Rep. 46 & 47 Vict. c. 49, s. 3.

(2) Rep. S. L. R. Act, 1891.

master or pedagogue of the said grammar school, created, founded and established under and by virtue of certain letters patent" of Queen Elizabeth, "for the education and instruction of youth, in which said place and office he the said G. Wray always behaved and governed himself well and according to the statutes and ordinances made for the management, ordering, direction and government of the upper master or pedagogue for the time being at such school, to wit at" &c. "Yet that you, the said Governors of the said Free Grammar School, without any reasonable cause, and contrary to the said letters patent, statutes and ordinances, have unjustly removed the said G. Wray from the said place and office of upper master or pedagogue of the said school, in contempt" &c. The writ then commanded the governors immediately to restore the said George Wray to the said place &c., or show cause to the contrary.

That the said school was founded by letters patent of Queen Elizabeth (15th June, 5 Eliz.), by which her Majesty granted that from thenceforth there should be a grammar school in the village of Darlington aforesaid, which should be called the Free Grammar School of Queen Elizabeth, for the education, institution and instruction of youth in grammar, to continue for ever, and the said school constantly of one master or pedagogue, and one usher or sub-pedagogue, to continue and \*be, she did set up, ordain, create, found and establish; and, that her intention aforesaid might be better enforced and take effect, and that the lands, revenues, and other things for the support of the said school afterwards granted, assigned and appointed might the better be governed for the establishment of the said school, she did will and ordain that the four wardens of Darlington, for the time being, should be, and be called, Governors of the said Free Grammar School, and of the possessions, revenues and goods of the said school; and she appointed the then wardens to be the then present governors, and incorporated them and their successors by the name of the Governors of the Free Grammar School of Queen Elizabeth within the town of Darlington in the county palatine of Durham; and did give and grant, to them and their successors, "that they, the same governors and their successors, and the major part of them, for the time being, might have, and for ever thereafter should have, full power and authority, from time to time, of electing, nominating and appointing a master and usher of the said free school aforesaid so often as to them and their successors, or the major part of them, occasion them moving thereto, should

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appear, and of removing the same master or usher, or either of them, from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or steads, and of performing and doing all other things which to the said free school relative to the teaching therein should be necessary and expedient." Of which letters patent (notice to Wray before his alleged misconduct). And the governors certified "that, although true it is that the within named G. Wray, after the making of the said letters \*patent and before the coming of the within writ to them the said governors, to wit A.D. 1836, was elected," &c. "and admitted to and into the place and office of upper master or redagogue of the within mentioned grammar school, and so continued until he was removed by us the said governors as hereinafter se: forth, yet that the said G. Wray did not always behave or conduct himself well as such upper master or pedagogue of the said school as within mentioned, and that they, the said governors, after the said G. Wray was so elected, appointed and admitted upper master or pedagogue of the said school, and before his removal as hereinafter mentioned, and whilst he held the office of such upper master or pedagogue, to wit on 1st January, A.D. 1840, and on divers other days and times between that day and the time when he was so removed from the said office as hereinafter mentioned, received from divers parents of divers free scholars of the said school and inhabitants of Darlington aforesaid, namely" (mentioning one Mary Smith and other persons by name), "divers complaints of the misconduct and inattention of the said G. Wray as such upper master or pedagogue of the said school, and particularly that the said G. W., whilst he was such master or pedagogue, on various occasions absented himself from, and neglected to attend at, the said school during the school hours, contrary to his duty " &c., "and to the prejudice of the scholars" &c. And the governors further said "that the said Mary Smith in particular on the several occasions aforesaid complained to the said governors, and charged against the said G. Wray, as such master aforesaid, that the said G. Wray, whilst he was such master" &c., did, on &c., under colour of his authority as such master, and \*of his said office. inflict unreasonably severe corporal punishment on T. S., son of the said Mary, then being an infant scholar of the said school, contrary to the duty &c.; and that G. Wray, while master &c., wrongfully and under colour of his said authority, on various occasions

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and 2s. from W. S. and the said T. S. sons of the said Mary, then being respectively scholars of the said school; and that G. W., under colour of his said office &c., wrongfully and contrary to his duty, on other occasions demanded and attempted to exact and receive divers other sums of money, to wit 9s. and 1l. 1s. from the said M. S. as parent of the said W. S. and T. S., then being respectively scholars &c. Whereupon we the said &c. (naming the defendants), "then being wardens of the church of Darlington aforesaid, and governors of the said school, having afterwards, to wit on 16th November, 1840, given notice of the same complaints and charges of the said Mary Smith to the said G. Wray, and having then called upon the said G. Wray to answer the said complaints and charges of the said M. Smith, and the said G. Wray having had reasonable time and opportunity in that behalf, but having notwithstanding failed so to do, and we the said governors having ascertained and being satisfied of the truth of the said complaints and charges, and that the said G. Wray was guilty of the said several offences and misconduct so charged upon him as aforesaid, in the exercise of our best discretion, and deeming the said G. Wray to be an unfit and improper person to fill the said office of upper master or pedagogue of the said school, before the coming of the said writ to us, namely, on 20th November, A.D. 1840, \*by an instrument in writing under our respective hands and sealed with the common seal of the governors of the said school, did, by virtue and in pursuance of the said letters patent, remove, discharge and displace the said G. Wray from the said office and place of upper master or pedagogue of the said school, as it was lawful and right for us so to do for the cause aforesaid: which is the removal of the said G. Wray in the said writ mentioned." Verification. "Wherefore we humbly pray your Majesty if we ought to be compelled to restore" &c.

The prosecutor, by force of the statute &c. (1), tendered several traverses; viz., 1. That he did not, while he was such master, absent himself &c., in manner and form &c. 2. That he did not inflict unreasonably severe corporal punishment on Thomas Smith, the son &c., in manner &c. 3. That he did not wrongfully &c. demand &c. from the said sons of Mary Smith, or either of them, in manner &c. 4. That he did not under colour &c. demand &c. from the said Mary Smith, in manner &c. 5. "That prior to his said removal he did not have, nor was allowed, reasonable time or

(1) 1 Will. IV. c. 21, s. 3 [repealed, see note, p. 522 above].

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opportunity to answer the said complaints and charges or either of them." Issues were joined on the traverses respectively. He further pleaded as follows.

6. "And, for plea to the said return, and by force of the said statute, the said G. Wray says that, in and by the said letters patent of her said Majesty Queen Elizabeth, her said Majesty did also will, grant, enjoin and declare that the said governors and their successors, with the assent of the Earl of Westmoreland and Bishop of Durham for the time being, from time to time should \*make, or cause and procure to be made, good, fit and salutary statutes, decrees and orders in writing touching and concerning the management, order, government and direction of the master, usher and scholars of the free school aforesaid, and each of them, for the time being, and of the stipend and salary of the said master and usher, and touching and concerning all other matters whatsoever to the said free school and the order, government, preservation and disposition of the rents, revenues and goods thereof appointed for the maintenance of the said school; which said statutes, decrees and orders so made her said Majesty did thereby will, grant and command should be inviolably observed from time to time for ever thereafter. And afterwards, to wit on 23rd February, A.D. 1748. in and by a certain instrument in writing bearing date a certain day" &c., "to wit the 3rd day of February in the year last aforesaid, and signed, sealed and duly executed by the persons hereinafter mentioned as the major part of the said governors for the time being, by whom the common and body corporate seal of the said school was duly affixed thereunto, reciting that since the granting of the said letters patent no statutes, ordinances or decrees in writing had at any time been made by the said governors of the said school, whereby the good intent of the founding therest had in many instances been greatly obstructed, and frequent unhappy divisions and contentions had arisen about the placing and displacing of proper masters in the said school, certain persons therein named, to wit Edward Lewson, Robert Turner and Robert Robinson, being, and therein described as, the major part of the four governors of the said school for the time being, did then and thereby, \*by and with the assent and consent of the right Reverend" &c. "Edward, then Lord Bishop of Durham, testified under his episcopal seal thereunto affixed, the title of the Earl of Westmore

land, named in the said letters patent, being at that time, that is to say at the time of the making of the said instrument, extinct.

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make, constitute, decree and ordain the several good and salutary statutes, constitutions, decrees and ordinances thereinafter and hereinafter mentioned, of and concerning (amongst other things) the ordering, governing and direction of the upper master and under master and scholars of the said school, and every of them, to be faithfully and inviolably kept and observed by them and their successors, and all and every other person and persons having any concern in the premises from time to time for ever, according to the true intent and meaning of the said letters patent: that is to say, concerning the electing, appointing, continuing and removing of an upper master or under master of the said school, they did decree, ordain, constitute and declare as follows, that is to say: That no man should thereafter be elected or appointed upper master of the said free school except he should be of the full age of twenty-four years at the least, and a person of sound learning, sober and exemplary life and conversation, good morals, and duly qualified to teach and instruct youth in the elements of grammar and the Latin tongue, and also for the right understanding of God's true religion: And also except, before he enter into or execute the said office of upper master, he should be duly licensed and allowed by the Bishop of Durham for the time being or his ordinary, and make and subscribe the declaration, and take the oaths by law required in \*this behalf." And, for the encouraging of the students of Oxford and Cambridge, and promoting of sound learning in the school, they decreed and ordained that a due preference and regard should be given to any graduate student in either of the said universities who should thereafter offer himself a candidate for the place of upper master whenever it should be declared vacant, provided he should produce proper and satisfactory testimonials of his morals and abilities from the college or society to which he does or did "And, for the further encouragement and inducing of such graduates, or other persons of known abilities and sound learning in the Latin tongue, to accept of and undertake the duty and office of upper master of the said free grammar school, they did thereby decree, ordain, constitute and declare that no upper master elected or appointed, or to be elected or appointed, and duly licensed and approved of in manner aforesaid, and who should be in the actual possession and exercise of the said office of upper master of the said free school, should at any time or times thereafter be displaced, removed or removable by them or their successors from the said office of upper master of the said free school unless some good and sufficient cause

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of complaint or misbehaviour should be exhibited in writing against such upper master, and signed by them or their successors, and the same cause of complaint be first allowed of and declared by them or their successors for the time being to be a sufficient cause to displace or remove such upper master, and not otherwise." Averment, that, although the said statutes, decrees and ordinances thereby became, and were at the time of G. Wray's removal, and are, in full force and effect, and although he had \*been and was duly qualified, elected, appointed, licensed and approved of in manner in the said decrees &c. mentioned and required in that behalf, and, before and at the time of such removal, had been and was in the actual possession and exercise of the said office, "yet no good and sufficient cause of complaint or misbehaviour being the same cause of complaint exhibited in writing against the said G. Wray as such upper master, and signed by the governors of the said school for the time being, that is to say, the said persons making the said return, was first, that is to say before the removal and displacing of the said G. Wray as aforesaid, allowed of and declared by them to be a sufficient cause to displace or remove the said G. Wray from his said office, according to the true tenor and effect of the said statutes, decrees and orders." Verification, and prayer of judgment and a peremptory writ.

Replication (protesting that the plea is insufficient in law). That, before the said removal and displacing of G. Wray, and whilst he was such master &c., to wit on &c., he the said G. Wray, under colour of his said office and his authority as such master, did inflict improper and unreasonably severe corporal punishment in and upon one Thomas Smith the younger, then being an infant scholar of and at the said school at Darlington aforesaid, contrary to the duty of the G. Wray, as such master, and contrary to the rules and regulations then in force for the government, management and direction of the said school and the master thereof. And that, before the removal &c., and whilst he was such master &c., to wit on &c., he the said G. Wray, under colour &c. (85 before), wrongfully and unlawfully demanded and attempted wrongfully to exact and receive from one Mary \*Smith, then being the wife of Thomas Smith the elder, and mother of the said Thomas Smith the younger, who was then a scholar of and at the said school, a certain sum of money, to wit one guinea, contrary to the duty &c., and contrary to the rules &c. "And the said governors further say that they the said governors, having then had notice of

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he premises, and complaint thereof having been made to them by he said Mary Smith, afterwards, and before the said removal " &c., o wit on &c., "exhibited a complaint in writing, signed by the said governors respectively, of and concerning and setting forth the said several causes of complaint against the said G. Wray in this plea above mentioned, and then caused the same complaint in writing, so signed as aforesaid, to be delivered to the said G. Wray; which causes of complaint were, and each of them was, good and sufficient cause for removing and displacing the said G. Wray from his said office of master of the said school. And the said governors further say that, the said G. Wray having failed to answer or defend himself against the said complaint and charges, although he had reasonable time and opportunity so to do, they the said governors afterwards, and before the said removal" &c., "to wit on" &c., "did allow of and declare the said several causes of complaint hereinbefore mentioned, and each of them, to be sufficient cause to displace and remove the said G. Wray from his said office of master of the said school, and did thereupon afterwards, to wit on" &c., "remove and displace the said G. Wray from his said office, in manner and form as in the said return of the said governors to the said writ of mandamus is alleged, and as it was lawful and right for them to do for the cause aforesaid. Verification, and \*prayer of judgment if a peremptory mandamus ought to be awarded.

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Rejoinder. That no complaint in writing, signed by the said governors respectively, and setting forth good and sufficient cause or causes of complaint, as in the said replication mentioned, was delivered to him the said G. Wray; and that the said governors did not, before the said removal, allow of and declare the same complaint or causes of complaint or either of them, so signed and exhibited as aforesaid, to be sufficient cause to displace and remove him the said G. Wray, in manner and form "&c. Conclusion to the country. Issue thereon.

On the trial, before Lord Denman, Ch. J., at the Durham Summer Assizes, 1842, a verdict was found for the Crown on all the issues.

In Michaelmas Term, 1842, Wortley obtained a rule nisi for arresting the judgment, or for entering a verdict for the defendants non obstante veredicto (1).

necessary to report the case as to this point.

<sup>(1)</sup> He moved also for a new trial, on the ground of misdirection, but the COURT refused a rule. It is not thought

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In Hilary Term, 1843 (1), Dundas, Hayward and Pashley showed cause: and Wortley and Joseph Addison supported the rule. It is considered sufficient to refer to the judgment, and to the arguments and judgment in the Court of Error. Besides several authorities, afterwards cited in the Court of Error, and mentioned in the report of the argument there, the following were referred to. Thomas v. Howel (2); Peyton v. Bury (3); Aislabie v. Rice (4); Earl Mountague v. Earl of Bath (5); Rex v. Hughes (6); The Case of Sutton's \*Hospital (7); Hicks v. Lanceston (8); Com. Dig. Condition (D 1), (D 7), (L 1); Moggridge v. Thackwell (9); Rutter v. Chapman (10); Robinson v. Hardcastle (11); Pomery v. Partington (12); Winter v. Lovedaz (13); Rex v. Morris (14); Rex v. Bellringer (15); Rex v. Miller (16); Blacket v. Blizard (17); Reg. v. The Justices of Cambridgeshire (18); Rex v. Grimes (19); Littledale, J. in Lucas v. Nockells (20).

Cur. adv. vult.

LORD DENMAN, Ch. J., in Hilary vacation, 1848 (February 8th), delivered the judgment of the Court:

This was a mandamus to the Governors of Darlington School, to restore a schoolmaster. The return set forth a charter of Queen Elizabeth, by which the charity was founded, and which conferred on the governors full power to appoint the schoolmaster, and to remove him, and appoint another, according to their sound discretion; the power of appointing being in general terms, and the appointment not purporting to give an office of freehold. It then stated that the prosecutor had been guilty of several acts of misconduct, specified in the return; that the governors gave him an opportunity of disproving the charges, which he had failed to do; and that the governors, in the exercise of their best discretion, being convinced of the truth \*of the charges, and deeming him an unfit and improper person to be master, had removed him from

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- (1) Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.
  - (2) 4 Mod. 67.

his office.

- (3) 2 P. Wms. 626, 627.
- (4) 18 R. R. 230 (8 Taunt. 459).
- (5) 3 Ca. Ch. 55.
- (6) 3 Ad. & El. 425.
- (7) 10 Co. Rep. 23 a, 31 a, 34 a.
- (8) 6 Vin. Abr. 266, Corporations, (G) pl. 5, &c.
  - (9) 6 R. R. 76 (7 Ves. 36, 69).
  - (10) 8 M. & W. 1.

- (11) 1 R. R. 467 (2 T. R. 241, 254. 781).
  - (12) 1 R. R. 787 (3 T. R. 665).
  - (13) Carth. 427, 429.
  - (14) 4 East, 17.
  - (15) 4 T. R. 810.
  - (16) 3 R. R. 172 (6 T. R. 268).
  - (17) 33 R. R. 360 (9 B. & C. 851).
  - (18) 7 Ad. & EL 480.
  - (19) 5 Burr. 2598.
  - (20) 29 R. R. 721 (10 Bing. 157, 186).

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The pleas denied all the specific facts: and, issue being joined upon them, they have all been negatived by the jury. But another GOVERNORS plea set forth a bye-law, made in the year 1748, declaring certain of DARLINGqualifications to be requisite for a master, and prescribing a certain process for removing any, giving the master a fair opportunity of being heard in his defence, whenever he may be accused with a view to his removal, with an averment that such process had not followed nor such opportunity given to the prosecutor. Issue having been taken on this plea, a verdict was found on this also for the prosecutor.

But the defendants have moved for judgment notwithstanding the verdict on these points, arguing that the bye-law is invalid in law, because inconsistent with the trust and power vested in the governors by the letters patent. (His Lordship then read the passage in the letters patent; ante, p. 523.)

We are clearly of opinion that this objection is fatal to the validity of the bye-law. We are far from saying that persons in authority ought not to give the fullest opportunity of defence to any of those employed under them, whom they may be disposed to remove on complaint preferred by others against them for misconduct. But they accept a larger trust, and impose on themselves a wider duty, when they undertake to govern the school in the manner required by this charter. They are bound to remove any master whom, according to their sound discretion, they think unfit and improper for the office: and, as that discretion may possibly be well exercised for defects of various kinds not amounting \*to misconduct, so there may be misconduct, incapable of proof by witnesses, but fully known to the governors themselves, on which they could not abstain from exercising their power of removing the master without the abandonment of their duty.

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Holding the bye-law invalid for this general reason, we need not consider the other objection urged against it, the want of sanction by an Earl of Westmoreland, no person with that title having been in existence at the time it was ordained.

But the question does not end here. The defendants have returned, not only the matters which, if proved, would bring the master within the operation of the bye-law, but, further, that they, being fully satisfied of the truth of the charges, removed him, deeming him an unfit person, in the exercise of their best discretion. And it was contended that, as the due conviction for offences specified had been put forward by the governors as their reason

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for dismissing the prosecutor, and as that reason failed, their act of dismissal remained without justification. But they might be reasonably satisfied of the truth of the charges, without possessing any means of proving them by evidence: and, even if they had no charge before them, they might still, in the exercise of their discretion, remove him for reasonable cause. The prosecutor has denied the charges and the trial; but he does not deny the exercise of discretion, which might have been disproved in fact, as by showing that malicious feelings against the master were indulged by the governors, or that they had some interest to serve in promoting another to his place.

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The allegation of removal in the exercise of discretion is an independent allegation, which the prosecutor does not deny, though it is accompanied with reasons \*which, on the trial, he disproved. But the power of the governors so to remove justifies their so doing; and it is not to be restricted by any opinion which we may form of the reasons on which they may have been induced to exert it.

The return is therefore good: and the defendants are entitled to our judgment. They will, however, have to pay the costs of the issues found in favour of the prosecutor.

Judgment for the defendants.

The judgment entered up was that: "because it appears to the Court here that the plea of the said G. Wray by him lastly pleaded to the aforesaid return of the governors" &c. "to the said writ of mandamus, and the matters therein contained, are bad and insufficient in law to entitle the said G. Wray to a peremptory writ of mandamus in this behalf; therefore it is considered "&c. "that, notwithstanding the verdict found for the said G. Wray on the several issues above joined as aforesaid, yet that no peremptory writ of mandamus do issue in this behalf; and the governors of the said free grammar school do depart hence without day in this behalf; and that the said governors do recover against the said G. Wray the sum of 1381. 10s. 9d. for their costs and charges by them laid out and expended in this behalf."

The prosecutor brought error in the Exchequer Chamber, assigning error in the common form. Joinder.

The case was argued in the vacation after last Trinity Term, and in the present vacation (1).

(1) June 24th, before Tindal, Ch. J., November 26th Coltman and Erskine, JJ., Parke, Maule and Rourney and Rolfe, Barons. And Alderson and

November 26th, before Tindal, Ch. J., Maule and Erle, JJ., and Parke. Alderson and Rolfe, Barons.

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Pashley for the plaintiff in error:

The plaintiff is entitled to judgment here, if the Court below Governors OF DARLINGmight legally have given judgment for him on the last traverse, TON SCHOOL. which alleges that Wray, before his removal, had not reasonable time or opportunity to answer the charges. [He cited Bagg's case (1), Rex v. Gaskin (2), Rex v. Ford (3), Rex v. Simpson (4), Rex v. Benn (5), Harper v. Carr (6), and Capel v. Child (7).]

[ 699 ]

This Court, in Rex v. Wilson (8), adopted the language used in 2 Hawk. P. C. 49, Book I., c. 64, s. 60 (9): "It is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself." These considerations acquire more force from the nature of the present office. The mandamus does not state it to be of freehold: but it is of uncertain duration, and may be for life. The charter gives to the four wardens the power of appointing a master and usher, "and of removing the same master or usher "" from the said school, according to their sound discretion, and of placing or appointing other or others more fit." That makes the tenure of the office very different from a holding durante bene placito. Lord Coke says that, if a man grant to another an estate for "as long as the grantee dwell in such a house," "or until the grantee be promoted to a benefice, or for any like uncertain time, which time, as Bracton saith, is tempus indeterminatum: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the \*deed:" Co. Litt. 42 a. office now in question is of this indeterminate tenure, and differs from one held merely at will and pleasure as in Dighton's case (10), cited on the argument below. An office may, by express terms of a grant, be made subject to removal ad libitum; "but generally, an officer shall not be removed without cause:" Com. Dig. Franchises (F 32). Here the master is, under the terms of the charter, removable by the governors only "according to their sound discretion."

[ •700 ]

<sup>(1) 11</sup> Co. Rep. 93 b, 99 a.

<sup>(2) 4</sup> R. R. 633 (8 T. R. 209).

<sup>(3) 12</sup> Mod. 453.

<sup>(4) 1</sup> Stra. 44.

<sup>(5) 6</sup> T. R. 198.

<sup>(6) 4</sup> R. R. 440 (7 T. R. 270).

<sup>(7) 37</sup> R. R. 761 (2 Cr. & J. 558;

S. C. 2 Tyr. 689).

<sup>(8) 3</sup> Ad. & El. 817, 826.

<sup>(9) 7</sup>th ed.

<sup>(10) 1</sup> Ventr. 77, 82; S. C. 1 Sid. 461; Sir T. Ray. 188.

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(MAULE, J.: What difference is there between "discretion" and sound discretion?"

PARKE, B.: The only question is whether, if they think fit to remove the master, they may not do so.

TINDAL, Ch. J.: If you could put this on the footing of a freehold office, it would be different.)

Bracton, f. 207 a, lib. 4, c. 28, states a holding "ut liberum tenementum" to be "sicut ad vitam tantum vel eodem modo ad tempus indeterminatum, absque aliquâ certâ temporis præfinitione, s. donec quid fiat vel non fiat:" but, he says, "liberum non potest dici tenementum alicujus, quod quis tenet ad voluntatem dominorum precariò, quod tempestivè et intempestivè poterit revocari."

(TINDAL, Ch. J.: You are giving the case of land; where there is a livery.)

A power to remove according to a sound discretion is, at any rate, not equivalent to a mere arbitrary power. Where parties are authorized "to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law:" Rooke's case (1); and "discretion" is defined according to this rule in Callis on Sewers, 112.

(TINDAL, Ch. J.: "Discretio est discernere per legem quid sit [\*701] justum:" 4 Inst. \*41.)

The dicta of Lord Coke on this subject in 4 Inst. and Rooke's case (2) are adopted by Lord Mansfield and Wilmor, J. in Rev. Peters (3).

(PARKE, B.: If the founder had intended to give an absolute power, could stronger words have been used than in this charter?

TINDAL, Ch. J.: What difference is there between power to remove at discretion, and at will?)

Natural justice makes a distinction.

(PARKE, B.: That cannot enter into consideration if there is a power to be exercised at will.

<sup>(1) 5</sup> Co. Rep. 99 b, 100 a.

<sup>(2) 5</sup> Co. Rep. 100 a.

<sup>(3) 1</sup> Burr. 568, 570.

ALDERSON, B.: The governors might have found a much fitter man. Suppose they had returned that. Must a jury have been called upon to say which was, for instance, the best scholar?)

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If the governors had simply returned that, in the exercise of a sound discretion, they had removed the master, that exercise of discretion might have been conclusive. Still it ought to appear that the party was called upon to answer.

(PARKE, B.: Why so? Suppose they thought him a heavy, stupid man; would there have been any advantage in hearing him?)

That argument is, at any rate, not open in the present case, because the defendants return that Wray, "having had reasonable time and opportunity" to answer, "but having notwithstanding failed so to do, and we the said governors having ascertained and being satisfied of the truth of the said complaints and charges, and that the said G. Wray was guilty of the said several offences and misconduct so charged upon him as aforesaid, in the exercise of our best discretion, and deeming the said G. Wray to be an unfit and improper person to fill the said office," discharged him. It may be observed that the exercise of discretion here is not on a mere question \*of fitness, but on that of Guilty or Not guilty.

[ \*702 ]

(TINDAL, Ch. J.: If they had returned merely that in the exercise of a sound discretion they removed him, would not that have been a good return? and does not the maxim "utile per inutile non vitiatur" apply?)

Having stated an adjudication, grounded on certain reasons, they were bound to show that the party to be affected had an opportunity of combating those reasons, according to the principle of justice laid down in the cases before cited, and acted upon in Painter v. Liverpool Gas Company (1), Reg. v. The Justices of the West Riding (2), Fisher v. Lane (3) and Bruce v. Wait (4).

(ROLFE, B.: Nobody disputes the principle; the question is if this case comes within it.)

In Reg. v. The Bailiffs of Ipswich (5), on mandamus to restore a

<sup>(1) 42</sup> R. R. 423 (3 Ad. & El. 433).

<sup>(4) 1</sup> Man. & G. 1.

<sup>(2) 7</sup> Ad. & El. 583.

<sup>(5) 2</sup> Ld. Ray. 1232, 1240.

<sup>(3) 3</sup> Wils. 297.

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party whom the corporation had discharged from the office of recorder, "Holt said that if he had been an officer ad libitum, the corporation ought to have returned that, and relied upon it, and it would have been a good return; but they could not take advantage of that, when they had returned a cause, if the cause were not sufficient; for it appeared, that they had not gone upon their power, and determined their will, but put him out for a misdemeanor." Lord Ellenborough uses language to a similar effect in Rex v. The Bishop of London (1).

(COLTMAN, J.: Who is to try the truth of the facts said to be the cause of dismissal?)

A jury.

(COLTMAN, J.: If the governors have an absolute discretion, the opinion of a jury cannot bind them.)

[\*703] In Reg. v. Smith (2), although the defendant returned that \*the acts by which the dismissal was justified took place in his own presence and hearing, this Court held that he ought to have summoned the party to answer, for that the conduct seen by the defendant might have been explained by witnesses.

(PARKE, B.: That was the case of a parish clerk, which is quite different from this.)

The dismissal of a schoolmaster for misconduct, without summons, was held irregular in *Doe* d. *Earl of Thanet* v. *Gartham* (3). The question of discretionary rejection and amotion was discussed, and many authorities cited, in *Rex* v. *The Mayor and Aldermen of London* (4), where the judgments of the Court do not go to the length which must be contended for on the other side.

Secondly, judgment non obstante veredicto could not be entered up in this case. \* \* \*

Thirdly, the plaintiff in error is at all events entitled to judgment on the special plea. The bye-law there set forth might reasonably be made for effecting the founder's intention, and might therefore have been enacted by the governors independently of any special authority, and by the power inherent in a corporation,

<sup>(1) 12</sup> R. R. 393 (13 East, 419, 422). See Rex v. The Archbishop of Canterbury and The Bishop of London, 13 R. R. 409 (15 East, 117).

<sup>(2) 64</sup> R. R. 590 (Q. B. 614).

<sup>(3) 25</sup> R. R. 649 (1 Bing. 357).

<sup>(4) 3</sup> B. & Ad. 255. See 49 R. R. 14.

according to the doctrine recognized in The Chamberlain of London's case (1). [He also referred to Child v. Hudson's Bay Company (2), Rex v. Westwood (3), Green v. Mayor of Durham (4), Com. Dig. By-law (B 2).] But, further, if the special authority was necessary in this case, it has been well pursued. The bye-law is, according to the terms of the charter, a good and salutary statute; and the directions of the charter have been sufficiently complied with in making it. \* \*

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Wortley, contrà:

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First: all the traverses are immaterial. The facts denied by the first four traverses are not directly alleged in the return as having been committed, \*but are recited merely as subjects of the complaint made to the governors. It is directly averred that Wray did not always behave or conduct himself well as master; but the misconduct is not alleged to have been "in that" he absented himself, or did the other acts complained of; and no issue is taken on the general averment in the return that he did not always behave himself well. Nor does Mr. Wray traverse the allegation that complaint was made as stated in the return. The ground of dismissal shown by the return is, substantially, that the governors dismissed Wray in the exercise of their best discretion, and believing him an improper person to be master. If he meant to allege that the dismissal really originated in mere caprice, he might have traversed the exercise of sound discretion. discretion of the governors, if reasonably exercised, is absolute: the very fact of complaint, or of a suspicion existing, might warrant them in dismissing the master. Indeed the words of the charter cited in the return seem to authorize a dismissal even if another master be found more fit than the person officiating. It is, however, contended on the other side that, even where the \*power to remove is discretionary, the person to be removed must have notice, and the option of being heard in defence. The words of the charter seem large enough to exclude this necessity: but it is argued that, notwithstanding such general words, there must be a cause of dismissal shown, and an opportunity of discussion given. Com. Dig. Franchises (F 32), which was cited to this point, does not bear out the proposition. Dyer, 832 b, in marg. is there

[ \*709 ]

[ \*710 ]

(4) 1 Burr. 127, 131.

<sup>(1) 5</sup> Co. Rep. 62 b.

<sup>(2) 2</sup> P. Wms. 207.

<sup>(3) 4</sup> B. & C. 781, 799. See Rex v.

Westwood, 33 R. R. 24 (7 Bing. 1), judgment of K. B. affirmed on error.

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referred to as showing that "generally, an officer shall not be removed without cause. Though the charter says, generally, that he may be removed." But in Tompson v. Edmonds (1), which seems to be the case relied upon, the ground of decision was that the party removed was an officer of the King. Where a power simply discretionary is given, it must be fairly exercised; but no cause need be shown; and therefore it is useless to summon the party; for those who exercise the discretion might allege that they had so done, and would not be bound to state the accusation. Wherever it has been held necessary to show a cause, the office has been freehold; Bagg's case (2) (where this ground is expressly taken), and Rex v. Gaskin (3), are instances. [He also referred to Reg. v. The Bailiffs of Ipswich (4), Rex v. The Mayor of Oxford (5), Rex v. Mayor of Stratford upon Avon (6), Rex v. Andover (7), Rex v. The Bishop of London (8), and Rex v. The Bishop of Gloucester (9). The argument for Mr. Wray, if applicable to this case, would extend to the dismissal of a servant: but it has been held in such cases that, if there was cause of discharge known to the master at the time, the proceeding is justified, though the cause relied upon was not then alleged, but a different one was: Ridgway v. The Hungerford Market Company (10), Baillie v. Kell (11), Cussons v. Skinner (12). The schoolmaster here is in the situation of a servant: the foundation is primarily for the benefit of the children, not for his.

(Wortley was heard thus far on June 24th; and the Court then adjourned. On November 26th, the Court being partly composed of Judges who were not present on the former day, Pashley was desired to restate the leading points of his argument, which he did; and the Court said they would take time to consider whether they should hear Wortley farther.

Pashley, on this occasion, added the following arguments in reply (13) to those of Wortley:)

It was not necessary to traverse the allegation that Wray did not

- (1) 3 Dyer, 332 b, note (28).
- (2) 11 Co. Rep. 93 b; see 98 b.
- (3) 4 R. R. 633 (8 T. R. 209).
- (4) 2 Ld. Ray. 1232.
- (5) 2 Salk. 428.
- (6) 1 Lev. 291; S. C., as Dighton's case, 1 Ventr. 77, cited p. 533, ante, note (10).
  - (7) 1 Ld. Ray. 710.
- (8) 12 R. R. 393 (13 East, 419, 422). See Rex v. The Archbishop of Canterbury

and The Bishop of London, 13 R. R.

409 (15 East, 117).

- (9) 36 R. R. 522 (2 B. & Ad. 158).
- (10) 42 R. R. 352 (3 Ad. & El. 171).
- (11) 4 Bing. N. C. 638.
- (12) 11 M. & W. 161. See Mercer v. Whall, 64 R. R. 544 (5 Q. B. 447).
- (13) He also added some observations not strictly in reply, which have been incorporated with the preceding argument.

always behave or conduct himself well as master: nor could it have been properly traversed, for it was too indefinite to call for an answer, no specific \*facts being stated: J'Anson v. Stuart (1), Neuman v. Bailey (2), Hickinbotham v. Leach (3). It is argued on the other side that the return, alleging a dismissal by the governors "in the exercise of" their "best discretion," they "deeming the said G. Wray to be an unfit and improper person" &c., is sufficient, the exercise of a sound discretion not being traversed. But this argument is not borne out by the charter. The words are different from those in Rex v. The Mayor of Oxford (4), where the town clerk was to hold "at the will" of the mayor and aldermen; in Rex v. The Mayor of Stratford upon Avon (5), where the town clerk was to be chosen durante bene placito; and Rex v. Andover (6), where the charter authorized the corporation to remove common councilmen "per discretiones suas toties quoties et quandocunque illis placuerit." In Reg. v. The Bishop of Gloucester (7) the decision was that the Court would not call upon the Bishop by mandamus to exercise his discretion in a particular way; and that was sufficient for the determination of the case. The dictum in Com. Dig. Franchises (F 32), that "an officer shall not be removed without cause," is not stated there as depending on Tompson v. Edmonds (8) referred to in the next line; though the reason given in that case, that the party was an officer of the King, may extend to the case where an office emanates from the King's charter. The defendants, in their return, treat the place of schoolmaster as an office which, according to Lord Ellenborough in Rex v. Mersham (9), "must be derived either immediately or \*mediately from the Crown," unless constituted by statute.

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[ \*714 ]

(PARKE, B.: This cannot make the place of schoolmaster here equivalent to a freehold office; it is no matter what they call him.)

Ridgway v. The Hungerford Market Company (10), and the other cases cited as to dismissal of servants, show that a master may discharge his servant if he has a good cause, though he did not state it to the servant or really act upon it, but not that he may assign one cause

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(1) 1 R. R. 392 (1 T. R. 748).
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<sup>(2) 1</sup> R. R. 393 (2 Chitt. Rep. 665).

<sup>(3) 62</sup> R. R. 654 (10 M. & W. 361).

<sup>(4) 2</sup> Salk. 428.

<sup>(5) 1</sup> Lev. 291.

<sup>(6) 1</sup> Ld. Ray. 710.

<sup>(7) 36</sup> R. R. 522 (2 B. & Ad. 158).

<sup>(8) 3</sup> Dyer, 332 b, note (28).

<sup>(9) 7</sup> East, 167, 171.

<sup>(10) 42</sup> R. R. 352 (3 Ad. & El. 171).

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in pleading and rely upon another. The material words in Tilly and Wody's case (1) are that the plaintiff "shall not have judgment;" which goes no farther than the language of Bonham's case (2), and means only that, under the circumstances pointed out, judgment shall be arrested.

The first and principal ground of objection taken by the plaintiff

Cur. adr. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT:

in error against the validity of the judgment given by the Court below is this: that the return to the writ of mandamus, when taken in connection with the finding of the jury, set out upon the record, furnishes no legal ground for the removal of the plaintiff from his office of schoolmaster, and that, consequently, the judgment of the Court below ought to have been given for the Crown. The plaintiff in error contends that, upon the proper construction of the letters patent of Elizabeth, the schoolmaster is appointed during good behaviour at least, so that he had in contemplation of law a freehold in his office, and that, upon the authority of Bappi's "case (3), Dr. Gaskin's case (4) and others cited, the plaintiff could not be legally amoved without being summoned to answer the charge, nor without having a reasonable time to answer, nor, lastly, without proof of the charges brought against him: all which steps are found by the jury not to have existed in this case.

And, if this is the true construction of the charter of foundation. if the office of the schoolmaster resembled that of a freeman of a borough, which was Bagg's case (3), who according to the report in Lord Coke (5) had "a freehold in his freedom for his life, and with others, in their politic capacity," "an inheritance in the lands of the said corporation," of if the office of schoolmaster resembled that of a parish clerk which was the subject of discussion in Dr. Gaskin's case (4), the inference drawn from those cases might be correct. But, looking to the terms of the letters patent of Queen Elizabeth, we think the office in question is, in its original creation. determinable at the sound discretion of the governors whenever such discretion is expressed, and that it is in all its legal qualities and consequences not a freehold but an office ad libitum only.

The governors would be guilty of misconduct, might perhaps render

<sup>(1)</sup> Year B. Hil. 7 Edw. IV. f. 31 A. pl. 18.

<sup>(2) 8</sup> Co. Rep. 120 b.

<sup>(3) 11</sup> Co. Rep. 93 b.

<sup>(4)</sup> Rex v. Gaskin, 4 R. R. 633 (5 T. R. 209).

<sup>.</sup> R. 209). (5) 11 Co. Rep. 98 b.

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themselves liable to a criminal prosecution, if they exercised their discretion of removal in an oppressive manner, or from any corrupt or indirect motive; but we see nothing that is to restrain them from exercising such discretionary power whenever they honestly think it proper so to do. The letters patent, after incorporating the governors, expressly give them the power of nominating, from time to time, a \*master of the said school "so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, and of removing the same master" &c., "from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or The founder had an undoubted right to repose this large confidence in the governors, if she thought proper: and she appears to have intended so to do without subjecting the exercise of this discretion either to the judgment of any visitor or of any jury; and, if the master was appointed ad libitum, as we think he was, it is clear he was removable without any summons or hearing of him: Rex v. Mayor of Stratford on Avon (1). And there seems nothing unreasonable in the founder's giving such authority to the For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual A general want of reputation in the neighbourhood, the very suspicion that he has been guilty of the offences stated against him in the return, the common belief of the truth of such charges amongst the neighbours, might ruin the well being of the school if the master was continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of amoval fully sufficient in the exercise of a sound discretion might be suggested.

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Such, therefore, appearing to us to be the meaning of the letters patent, and there being an express allegation \*in the return that the governors did, in the exercise of their best discretion, and deeming the plaintiff to be an unfit and improper person to fill the said office of master, remove and displace him therefrom, which allegation is not traversed or denied in the plea, we think the several issues raised were altogether upon immaterial points, and that, notwithstanding the finding of the jury on those issues, the return is virtually and substantially a good return.

[ \*717 ]

It was in the second place argued by the plaintiff in error that,

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however the case might have stood upon the original letters patent, vet, as the governors had in fact found a bye-law regulating the mode of appointment to the office of master of the grammar school and of the displacing of him from that office, and, as the jury had found that the requisites prescribed by such bye-law to be observed before the master could be displaced had not been complied with in this instance, therefore, at all events, the plaintiff was entitled to his peremptory mandamus. But we think the governors for the time being had no authority under the letters patent to make such bye-law so as to bind their successors in the execution of their duty: nothing can be better established than that a bye-law by a corporation, which alters the constitution of the corporation, is void; and upon the same principle a bye-law which restrains and limits the powers originally given to the governors by the founder himself we think must be bad. Here the governors had the power given to them by the founder of removing the master from the said school according to their sound discretion, and of placing and appointing another more fit in his stead. And we think this power is manifestly impaired and diminished in a degree that may be materially detrimental \*to its exercise for the interests of the school, by introducing, two centuries afterwards, the necessity of exhibiting a complaint in writing against the master signed by the governors, and the further necessity that the same cause of complaint should be first allowed of and declared by the governors a sufficient cause for displacing

the said master. And we therefore think the second ground of objection taken, namely, that, by reason of the requisites of the bye-law having not been complied with, the return to the mandamus must be held a bad return, altogether fails.

The last ground of objection is that the judgment of the Court below is bad in law, inasmuch as it is a judgment for the defendants

below is bad in law, inasmuch as it is a judgment for the defendants non obstante veredicto, which, it is contended, is not good in law in favour of a defendant. In order to ascertain the validity of that objection, we must look at the statute of Anne (1), which is made to apply to the present case by stat. 1 Will. IV. c. 21, s. 3 (2). For the proceedings upon a mandamus are first given by the statute of Anne, and are the creature of that Act. The second section of that statute provides, first, for the case of the person suing such writ, and, next, for the case of the person making the return. It authorizes the person suing the writ to plead to, or traverse, all or any of the

<sup>(1) 9</sup> Ann. c. 20, s. [2 [repealed by (2) Repealed by S. L. Rev. Act, 189]. 46 & 47 Vict. c. 49, s. 3.—A. C.]. —A. C.

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material facts contained within the return. It further provides that, in case a verdict shall be found for the person suing such writ, or judgment given for him on a demurrer, or by nil dicit, or for want of a replication or other pleading, he shall recover his damages and costs in such manner as he might have done in an action on the case for a false return, and a peremptory \*writ of mandamus shall be granted without delay for him for whom judgment has been given, as might have been done if such return had been adjudged insufficient. The clause next provides for the person making the return, and enacts that, in case judgment shall be given for him, he shall recover his costs of suit. statute, therefore, evidently contemplates that judgment must be given for the one or the other. Now, in the present case, we have already expressed our opinion that the plaintiff has taken his issues, not upon the material facts contained within the return, but upon facts that are altogether immaterial; and by reason thereof we think he is not entitled to judgment upon a verdict found for him on such issues, nor to a peremptory writ of mandamus, which is the consequence of such judgment. the person suing the writ not being entitled to the judgment, and the return to the writ being sufficient by reason of its containing the material allegation before adverted to, which is not denied, we think the latter part of the second section of the Act applies to this case, and that the persons making such return are entitled to judgment and to recover their costs of suit. this reason it becomes unnecessary to consider the question, whether in ordinary actions the defendant is entitled to a judgment in his favour non obstante veredicto.

We agree, therefore, with the Court of Queen's Bench, that the defendants are entitled to the judgment and costs under the circumstances disclosed on this record, and that the judgment given by

that Court must be affirmed.

Judgment affirmed.

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[ \*719 ]

1845. Jan. 13.

[ 721 ]

## Ex PARTE THOMPSON (1).

(6 Q. B. 721; S. C. 14 L. J. Q. B. 176.)

Where a rule for a mandamus to compel a corporation to make an order has been discharged, on the ground that no demand and refusal have taken place, the Court will not grant a new rule for a mandamus to the same effect, though a demand and refusal have taken place since the discharge of the former rule.

A. J. STEPHENS moved for a rule calling on the Mayor, Aldermen and Burgesses of the borough of Stamford to show cause why a mandamus should not issue, commanding them to cause the treasurer of the borough to render an account of the sum of 117l. 19s. 3d., received by him as such treasurer, and to pay the said sum into the borough fund, or to such person as the council should authorize to receive the same. He stated that, in last Easter Term, a rule nisi had been obtained to the same effect, which had been discharged in last Michaelmas Term, without costs, on the ground that it did not appear that there had been a demand and refusal; but he added that, since the discharge of the rule, a demand had been made which had been virtually refused.

(LORD DENMAN, Ch. J.: Then you are making an application which has already been refused, on fresh materials.)

A fresh right has accrued which did not exist when the former rule was discharged, and the absence of which occasioned the discharge.

(LORD DENMAN, Ch. J.: We have often refused rules on this ground: we cannot have the same application repeated from time to time.)

Per Curiam (2).

Rule refused.

1845. Jan. 14.

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#### MARTHA STONEHEWER v. FARRAR.

(6 Q. B. 730—744; S. C. 14 L. J. Q. B. 122; 9 Jur. 203.)

An award in an action where several issues are joined, and the costs are to abide the event of the award, ought to contain a distinct finding of each issue. For want of such finding the award will be bad for uncertainty unless (semble per Lord Denman, Ch. J.) it be clear, on the face of the award, that the arbitrator has in effect found on every issue (3).

Where an action for polluting the water of a watercourse was referred to an arbitrator, with power to him to regulate the enjoyment of the water.

Held, that an award directing a verdict to be entered for plaintiff, and

(1) Foll. Reg. v. Mayor and JJ. of Bodmin [1892] 2 Q. B. 21, 61 L. J. M. C. 151.—A. C. Coleringe and Wightman, JJ.

(3) See Ellis v. Desilva (1881) 6 Q. B. 521, 50 L. J. Q. B. 328. A. C.

(2) Lord DENMAN, Ch. J., PATTESON,

that defendant should at all times take all proper and reasonable precautions for preventing the water from being rendered unfit for plaintiff's use, and, in particular, should use a process of filtering mentioned in the award, was bad for uncertainty.

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The direction as to the particular process was, that the water passing from defendant's to plaintiff's premises should be passed through filtering lodges made or to be made by defendant, so as to be thereby purified and cleansed for plaintiff's use, "so far as the same can be purified and cleansed by the ordinary and most approved process of filtering as aforesaid."

Held, that the description by reference only to the "ordinary and most approved process" was uncertain, and the award bad in this respect also.

Case. The declaration stated that plaintiff before and at the time &c. was, and from thence hitherto has been, and still is. lawfully possessed of certain bleaching and dyeing works and premises, situate &c., in and upon which said works and premises plaintiff, for and during all the time aforesaid, exercised &c. the trade and business of a dyer and bleacher, and, by reason thereof. before and at the time &c. of right ought to have had and enjoyed, and still of right ought &c., the benefit of the water of a certain stream or watercourse in the county &c., which during all that time of right ought to have run and flowed, and still of right ought &c.. into and through two reservoirs or lodges for water, theretofore made, unto the said works of the plaintiff, in a state to be used by the plaintiff in her said trade and business of a bleacher and dver. without being polluted or mixed with injurious or noxious matter by the defendant as hereinafter mentioned. Yet defendant, well knowing &c., but wilfully contriving &c., while plaintiff was so possessed of her said bleaching and dyeing works &c., and so exercised her said trade &c. there, and was so entitled to such water as aforesaid, \*to wit on &c., and on divers other days &c., wrongfully cast, deposited and mixed, and caused to be cast &c., into and with the waters of the said stream &c., higher in the stream thereof than the said works &c. of plaintiff, divers large quantities of lime and other injurious and noxious articles. materials, &c., and thereby the waters of the stream &c. became polluted and mixed with the said injurious and noxious matter, and, being so polluted and mixed, the waters of the said stream &c. have thence hitherto run and flowed down the said stream &c., unto and into the said reservoirs, and thence unto and into the said bleaching and dyeing works &c. of the plaintiff, in such polluted state and so mixed with injurious and noxious matter as aforesaid. whereof &c. (allegation of damage by the reservoirs becoming filled with sediment, and the waters diminished and polluted, &c.).

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STONE-HEWER v. Farrar Pleas. 1. Not guilty. 2. That plaintiff ought not at the said several times &c., or any or either of them, of right to have had and enjoyed, nor ought she of right to have and enjoy, the benefit or advantage of the water of the said stream in the declaration in that behalf mentioned, nor ought the same during the time in the declaration in that behalf mentioned, or during any part thereof, of right to have run and flowed, nor ought it of right to run and flow, into and through the said two reservoirs &c., unto the said works of the plaintiff in a state to be used by the plaintiff in her said trade and business of a bleacher and dyer without being polluted or mixed &c. by the defendant, in manner and form &c.: conclusion to the country. Issues thereon.

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The cause came on for trial at the Liverpool Summer Assizes, 1842; when a verdict was found for the plaintiff \*with 2,000. damages and 40s. costs, subject to be reduced or vacated, and instead thereof a verdict for the defendant, or a nonsuit, entered, according to the award after mentioned. And it was ordered by the Court that the cause and all matters in difference between the parties should "be referred to the award, order" &c. of &c. (a barrister), so as he should "make and publish his award in writing of and concerning the premises in question on or before " &c. And "that the arbitrator shall have power, if he shall think fit, to call in scientific or practical persons to assist him in his investigation:" and "shall also have power to regulate the future enjoyment of the water." The costs of the cause were to "abide the event and determination of the said award," and the costs of the reference and award to be in the arbitrator's discretion. made his award, which, after the usual recitals, proceeded as follows

"Now these presents witness that I, the said "&c., "do make my award of and concerning the premises aforesaid in manner following, that is to say: I do award and determine that the said plaintiff had good ground of action against the said defendant, and is entitled to a verdict in the said action, and to recover therein damages against the said defendant to the amount of 40L: and I direct that the verdict be for the plaintiff for the said sum of 40L accordingly. And I further find and award that the said plaintiff is entitled to have and enjoy the benefit and advantage of the water of the stream or watercourse referred to in the declaration in the said action, and in respect whereof disputes and differences have arisen between the said parties as aforesaid, flowing into "and through two reservoirs or lodges for water unto the bleaching and

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dyeing works and premises of the said plaintiff in the said declaration mentioned, so as that the same water may at all times be used by the said plaintiff in and for the purposes of her trade and business of a bleacher and dyer, without being in any degree rendered unfit or less fit to be so used by the said plaintiff in consequence of the same water being polluted or mixed with injurious or noxious substances or matter, or otherwise detrimentally affected by or on the part or through the act or default of the said defendant in or in any wise relating to the carrying on his trade or business of a bleacher upon his works and premises. situate upon or near to and higher up the said stream or watercourse, by reason of the said defendant employing the water of the said stream or watercourse in his said last mentioned trade or business of a bleacher, or by reason of any thing relating to the carrying on of his said trade or business as aforesaid in any wise howsoever. And I further award and direct that, as regards the trade and business of the said defendant as a dyer, which has been by him carried on upon his said works and premises, the said defendant shall at all times take and use all proper and reasonable precautions and measures for the purpose of preventing the water of the said stream or watercourse from being, by the carrying on of the said defendant's trade or business of a dyer as aforesaid, or in consequence thereof, rendered unfit or less fit for the use of the said plaintiff in her said trade or business of a bleacher and dyer. And, in particular, I award and direct that the refuse and contents of the dyeing vats or vessels of the said defendant, when emptied out, and also all other refuse \*water, liquid or other materials or substances, which shall or may have been used in the carrying on of the said defendant's trade and business of a dyer as aforesaid, or shall arise therefrom or from any process connected therewith, and which could in any wise pollute or injuriously affect the water flowing in and along the said stream or watercourse to the said works and premises of the said plaintiff, so as to render the same unfit or less fit to be used by the said plaintiff in her said trade or business of a bleacher and dyer, shall, before entering into and becoming mixed with the water of the said stream or watercourse, be, by and at the expense of the said defendant, passed into and through certain filtering lodges heretofore made, and situate between the said works of the said defendant and the said works of the plaintiff, or through other filtering lodges or filters, to be for such purpose made and completed by and at the expense of the said

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[ \*735 ]

defendant, so as to be thereby effectually purified and cleansed for the use and benefit of the said plaintiff in her said trade or business of a dyer and bleacher, so far as the same can be purified and cleansed by the ordinary and most approved process of filtering as aforesaid. And I award and direct that the said filtering lodges or filters so heretofore made, or to be made, as aforesaid, shall, from time to time, by and at the expense of the said defendant, be maintained and kept in good order and condition, and be from time to time run off, emptied, cleansed and renewed when and so often as occasion shall require for the purposes hereinbefore mentioned. And I further award and direct that, when and so often as it shall by the said plaintiff be found or deemed necessary to open and clear out the said stream or \*watercourse hereinbefore mentioned or referred unto from and below the point at which the water from the said filtering lodges or filters enters or shall hereafter enter into the said stream or watercourse, not being higher up the same than heretofore, the same may and shall be opened and cleared by and at the expense of the said plaintiff." followed a direction as to costs of the reference and award.) In witness &c.

Baines, on behalf of the defendant, in Trinity Term, 1844, obtained a rule to show cause why the award should not be set aside on the grounds:

First. "That the arbitrator has not awarded specifically upon each of the issues."

Secondly. "That the award is uncertain, ambiguous, and not final, in the respects following: 1. It does not describe or ascertain in any way the precautions and measures which the defendant is to take for the purpose of preventing the water in the said rule mentioned from being, by his dyeing operations, less fit for the use of the plaintiff's business. 2. In the particular direction as to passing the refuse and contents of the dyeing vessels of defendant, and the refuse water, liquid or other substances, used in carrying on defendant's business as a dyer, he is required to pass it through certain filters heretofore made, or through others to be for such purpose made, so that the water may be purified by the ordinary and most approved process of filtering, without describing any such process, or stating how the ordinary or most approved process is to be ascertained. The third and fourth objections under this head were, that the award did not dispose of all the matters in difference,

since it gave no direction as to the duty or obligation of \*cleansing out the watercourse: and that, in the only direction given as to cleansing out the watercourse, it was not stated for what distance or in what part the plaintiff was to be at liberty to open and clear out the same when and so often &c.

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With regard to the second objection, affidavits were made by persons experienced in chemistry and the processes of bleaching, who stated that the directions of the arbitrator as to filtering were, in their opinions, intelligible, practicable, and easy of execution, and that the "ordinary and most approved process of filtering" was well known to persons in the habit of purifying water by filtration; that a manner of filtering, used at certain \*bleaching works in Lancashire, was described in evidence before the arbitrator, and that the directions of the award were "in accordance with the means adopted at the said works" as described on the arbitration.

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Wortley and W. H. Watson now showed cause:

First. It is true that the arbitrator has not awarded in terms on both the issues; but he has substantially disposed of them; and "it is sufficient, if looking at the whole award, it appears that the matter is determined." [They referred to Jackson v. Yabsley (1), Duckworth v. Harrison (2), Gisborne v. Hart (3), Bourke v. Lloyd (4), Brooks v. Parsons (5), Avelett v. Goddard (6), Lowe v. Allen (7), England v. Davison (8), Cooper v. Langdon (9), and Kilburn v. Kilburn (10).]

Then as to the next objection.

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(LORD DENMAN, Ch. J.: Is it sufficient to say that the defendant shall take "all proper and reasonable precautions," but "in particular" that the contents of the dyeing vats be filtered? Suppose he did the specific thing, and you were not satisfied, could you then have an attachment against him for not using all proper and reasonable precautions?)

He is to do the thing specified, but at the same time to use all ordinary and reasonable precautions. Then, as to the objection that the defendant is ordered to purify and cleanse "by the

- (1) 5 B. & Ald. 848.
- (2) 51 R. R. 671 (4 M. & W. 432).
- (3) 52 R. R. 624 (5 M. & W. 50).
- (4) 62 R. R. 701 (10 M. & W. 550).
- (5) 1 Dowl. & L. 691.
- (6) 59 R. R. 820 (11 L. J. C. P. 123;
- Hil. T. 1842).
  - (7) 4 Q. B. 66.
  - (8) 9 Dowl. P. C. 1052.
  - (9) 60 R. R. 671 (9 M. & W. 60).
  - (10) 13 M. & W. 671.

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ordinary and most approved process," but the award does not state how that process is to be ascertained; it is not necessary that the arbitrator should himself give scientific instructions; it is sufficient if (as the affidavits show) the general directions of the award are intelligible, practicable and easy of execution, and the "ordinary and most approved process" well known and readily ascertainable.

(COLERIDGE, J.: Suppose a question arose thirty years hence on the fulfilment of the award; must the Court then go back to enquire what was the ordinary and most approved process thirty years before?)

At all events it might be enquired then if he had taken all reasonable precautions. "In particular," here, may have the effect of a ridelicat. The authority given to the arbitrator to regulate the enjoyment was a power which he might exercise or not at his option: Angus v. Redford (1); if he has exercised it imperfectly, the award is not vitiated. The award would have been sufficient if \*it had stopped at the clause requiring ordinary and reasonable precautions. But any further direction that he might have given must have been carried out in detail by a scientific person: to require such directions as would leave nothing to be so supplied would make it impossible, in many cases, to frame a good award. In awarding a transfer of property, it is usual to direct that it be done by proper conveyances, or the most approved mode of conveyance, without specifying the deeds.

(LORD DENMAN, Ch. J. mentioned Winter v. Lethbridge (2).

Crompton, for the defendant: There the matter said to be wrongly decided was beyond the submission.

LORD DENMAN, Ch. J.: It was a mere excrescence; the rest of the award was good.)

The remaining objections were not argued.

Baines and Crompton, for the defendant, were not called upon

LORD DENMAN, Ch. J.:

Three objections to this award have been argued. The first is certainly embarrassing; and I hope a similar case to this

(1) 11 M. & W. 69.

(2) 28 R. R. 709 (13 Price, 533).

will not arise again. All arbitrators would do wisely by finding distinctly on each issue: though I do not say that, where this is not done, the award may not raise so clear an inference of a finding on each issue as to exclude the objection of uncertainty. But it is better to avoid any such question. In this case, however, there are other objections which must prevail. award is uncertain, as not describing or ascertaining the precautions which are to be taken. It states, first, that the defendant \*" shall at all times take and use all proper and reasonable precautions and measures for the purpose" of preventing impurity in the water; and then it adds, "And, in particular, I award and direct" that the contents of the dyeing vats shall be passed through filtering lodges, so as to be thereby purified for the plaintiff's benefit, "so far as the same can be purified and cleansed by the ordinary and most approved process of filtering as aforesaid." Now, in this clause, when the award, affecting to give a direction as to the cleansing of the water, says that the defendant shall use all reasonable precautions, and follows that up by the words, "and in particular" that the contents of the vats shall be passed &c., it is just the same as if the particular direction were left out; for, although that were complied with, there may still remain something, alleged to be a direction of the arbitrator, the omission of which may become the subject of complaint, and ground for an attachment. I think we should leave an opening to much litigation and injustice if we held this general direction to be of any value. The particular words which follow are also too uncertain. The award speaks of the "most approved process." By whose approbation is that to be determined? The witnesses who have made affidavits say that they understand the direction; but even they do not themselves state what, in their view, is the most approved method. It may be that the arbitrator risks the validity of his award if he attempts to set out the process, and does it imperfectly; but much more is risked by the generality of description introduced here. The arbitrator must make himself scientifically master of the subject: he is bound to understand it so fully that he may make a statement on \*which no one can have a doubt, and that, when the material acts prescribed have been performed, it may be seen that the award is complied with, and parties may not be put to enquire for the greatest number of approvers. If dangers are to be considered, the most important is that which parties may incur, of acting upon awards which do not finally settle rights.

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In Brooks v. Parsons (1) I proceeded on the authority of Bourke v. Lloyd (2). Whether this latter case be distinguishable from others on the ground stated by Mr. Watson, is for the Court of Exchequer to decide. Certainly Cooper v. Langdon (3) was not brought to my notice. It was just possible that the finding upon several contradictory issues in that case might be consistent, on the supposition adopted by the Court, though whether it is worth while to be so astute for the purpose of supporting an award I do not know. I agree, however, in the position that an arbitrator ought to find specifically upon each issue, in order that litigation may be avoided. As to the other branch of objection; it is assumed that, if the award had stopped at the direction to use all proper and reasonable precautions and measures, that would have been sufficient: but I cannot conceive any thing more likely to bring on future litigation than such a general mode of statement. Contradictory evidence might have been offered at any subsequent time on the reasonableness and propriety of the measures. It was the arbitrator's duty to state what they were to be. It is suggested that the clause may be read as if the arbitrator directed \*that reasonable measures should be taken, "namely" those specified immediately after. But the award is that "all" proper measures shall be taken, and, "in particular," one. Whether that particular mode, as pointed out, is intelligible or not, may be But I think the award is bad altogether. In a question. Winter v. Lethbridge (4) the arbitrator had exceeded his authority in one particular direction; and the award, though bad as to this, was held not to be wholly void: but no case decides that, where an arbitrator has power, and in the exercise of it gives a faulty direction, that part of the award may be struck out and the rest preserved. The case in which it was held that an arbitrator might omit to exercise the power of specifically regulating the enjoyment cannot help an award where the arbitrator has undertaken to give a specific regulation, and has done it erroneously.

Coleridge, J.:

On the first point, I will only say that I adopt the observations of my Lord and my brother PATTESON. As to the last, it has been suggested that, if the arbitrator has the choice of dictating a

(1) 1 Dowl. & L. 691.

(3) 60 R. R. 671 (9 M. & W. 60).

(2) 62 R. R. 701 (10 M. & W. 550). (4) 29 R. R. 709 (13 Price, 533).

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regulation or not, and lays down an imperfect one, it is not material. But I do not agree in this view. If the arbitrator goes wholly out of his jurisdiction, the award, on that point, is merely void, and need not be obeyed; but, if the direction be within the arbitrator's power, it binds, and ought to be clear in its terms. It is an expression sometimes used, that the Court ought not to be astute in finding objections to awards; but I think the right rule extends to this, and no more, that we should construe \*them candidly and sensibly, in the same manner as other documents.

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### WIGHTMAN, J.:

I think it is important that an arbitrator, in making his award, should find on each issue. But, further, I am of opinion that this award is uncertain as to the mode of purifying the water. An award ought to be so express that there should be no difficulty or doubt as to the performance. In this case there is a twofold uncertainty; the specific mode is incompletely described, and it is left doubtful whether the adoption of that mode alone will fulfil the arbitrator's intention, or whether it is prescribed only in addition to the other "proper and reasonable precautions" directed by the award. The discussion we have heard shows the uncertainty; for Mr. Wortley's argument appeared to proceed on one view of the case, and Mr. Watson's on the other.

Rule absolute.

## REG. v. THE INHABITANTS OF HEANOR (1).

(6 Q. B. 745—749; S. C. 13 L. J. M. C. 144; 1 New Sess. Cas. 460; 9 Jur. 105.)

Under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 95, the Judge has no power to direct the costs of an indictment for non-repair of a road, preferred by the direction of justices, to be paid out of the highway rate, except where there is a highway, and the liability to repair it is in dispute.

Therefore, where defendants had been acquitted on the sole ground that the road in question was not a highway, and the Judge certified for costs under this section, this Court set the certificate aside.

WHITEHURST, in last Trinity Term, obtained a rule calling on the prosecutor to show cause why the certificate for costs in this prosecution, granted by the Lord Chief Justice of the Court of Common Pleas, should not be set aside. The following facts appeared on affidavit in support of the rule.

The prosecutor, under sect. 94 of the Highway Act, gave information that an alleged highway in the township \*of Heanor, in the

(1) Dist. Reg. v. Farrer (1866) L. R. 1 Q. B. 558, 565, 35 L. J. M. C. 210.

1845. Jan. 14.

[ 745 ]

[ \*746 ]

Reg. v. The Inhabitants of Heanor.

parish of Heanor, Derbyshire, was out of repair. The surveyor of the township and some of the inhabitants attended at Special Sessions, and admitted that the township was liable to repair all the highways within it, and that the road was out of repair as a public carriage way; but they denied that it was a highway at all for carriages; and it was not pretended that the road was out of repair as a bridle way. The justices ordered an indictment to be preferred against the inhabitants. This order was not set out the deponent not being able to obtain a copy. The indictment was tried before Tindal, Ch. J., at the Derbyshire Spring Assizes, 1844, when the defendants did not contest their liability to repair the road, if it was a public highway for carriages; but this fact was not proved by the prosecutor, and was negatived by the witnesses for the defence; whereupon the LORD CHIEF JUSTICE stopped the defence, and the jury found for the defendants. On 23rd May, 1844, the prosecutor obtained a summons from Tindal, Ch. J., to show cause why he should not certify for the prosecutor's costs. The summons was attended by counsel on 27th May, before TINDAL, Ch. J., who said that he would not make the order unless he was obliged to do so, but that he had no discretion: and his Lordship accordingly (1) made the order, which was afterwards indorsed on the postea. His Lordship was requested to insert in the order the fact \*that the road was found not to be a highway, but declined to do so, observing that the defendants could have the advantage of his notes of the trial on a motion to set aside his order.

[ \*7±7 ]

The affidavits in answer denied that the liability of the township to repair all the highways within it was admitted before the justices, or that the way in question was alleged not be a carriage highway. They also stated that application had been made, on 15th April, 1844, to Tindal, Ch. J., for his certificate for the prosecutor's costs; but that his Lordship declined to say any thing in the matter till the result of a motion, which was to be made in this Court, should be ascertained. That, on 19th April, this Court was moved, on behalf of the prosecutor, for a verdict to be entered for the Crown, or for a new trial to be had: which application was refused (2).

<sup>(1)</sup> See Reg. v. Heanor, note to Reg. v. Great Broughton, 2 Moo. & Rob. 445, note (a). The following is a copy. "The Queen v. The Inhabitants of Heanor. Upon hearing counsel, and the attornies or agents on both sides, and by consent, I do order that

the associate for the Midland circuit attend with the Nisi Prius record for the purpose of indorsing thereon my certificate for the prosecutor's costs pursuant to the statute. Dated the 27th May, 1844. N. C. Tindal."

<sup>(2)</sup> See post, p. 555, note (3).

Some other facts were added to explain the delay in the hearing of the summons.

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Humfrey and Gale now showed cause:

If the Judge had a discretion, the Court will not review the exercise of it. Nor, if the law gives him such a discretion, will they enquire whether the Judge conceived that he was entitled to act according to his discretion. "To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous: "Reg. v. The Justices of the West Riding (1). All the requisites of stat. 5 & 6 Will. IV. c. 50, s. 95, have been satisfied.

(COLERIDGE, J.: Out of what funds are the costs to come?)

Out of the sums to \*be levied by a highway rate.

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(Coleridge, J.: But this is no highway.)

That answer would leave the liability to costs to depend on the question whether the prosecution succeeded or not.

(Patteson, J.: The supposition in the section is, that the existence of the highway is admitted, and that the liability only is in dispute.)

The interpretation clause, sect. 5, extends the meaning of "highways" to all roads. Besides, the justices have a discretion, as was decided, in Reg. v. Earl of Radnor (2), upon sect. 94; and, that being so, it must be assumed that the existence of the highway was admitted before the justices; and then, in a prosecution upon their order, the only issue legitimately before the jury would be as to the liability; and the existence of the highway would therefore not properly be in dispute (3). There does not, however, appear to be any substantial reason why one question should not be tried at the

- (1) 55 R. R. 396 (1 Q. B. 624, 631). (2) Note to Reg. v. Chedworth, 9 Car. & P. 288.
- (3) Gale, in Easter Term, 1844 (April 19th), had moved, on this ground, in the present case, to enter a verdict for the defendants, or for a new trial: but the COURT (Lord DENMAN, Ch. J., PATTESON and WIGHTMAN, JJ.) refused the rule. PATTESON, J. stated that, on the

Oxford circuit, he had decided that sect. 95 gave no power to certify for costs where the road was not a highway: and Lord Denman, Ch. J. added that he himself, upon this ruling of Patteson, J. being cited to him, had ruled that the section applied only where the existence of the highway was admitted and the dispute confined to the liability.

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expense of the parish as well as the other. Further, the record shows simply a verdict of Not guilty.

Whitehurst, contrà, was stopped by the Court.

#### LORD DENMAN, Ch. J.:

The Lord Chief Justice of the Common Pleas, when he made this order, was not informed, as he ought to have been, of what had passed \*here upon the refusal of the rule nisi for a new trial. It was then distinctly stated that the section was inapplicable, as to costs, when there was no highway. When the party insisting upon the existence of the highway contended that, whether he succeeded or not, he was entitled to his costs, I was struck with the grossness of the injustice; and, finding that my brother Patteson had held that sect. 95 applies only where there is a highway and the question is confined to the liability, I ruled accordingly. Had these rulings been communicated to the Lord Chief Justice of the Common Pleas, he would not have granted this certificate. I cannot, therefore, say that this has been an exercise of his discretion: he had not the facts before him. We must make this rule absolute.

PATTESON, COLERIDGE and WIGHTMAN, JJ. concurred.

Rule absolute.

1845. Jan. 15. REG. v. THE JUSTICES OF HERTFORDSHIRE (1).

(6 Q. B. 753-758; S. C. 14 L. J. M. C. 73; 1 New Sess. Cas. 490; 9 Jur. 424.)

[ 753 ]

If any one of the magistrates hearing a case at Sessions be interested in the result, the Court is improperly constituted, and an order made in the case will be quashed on *certiorari*. It is no answer to the objection, that there was a majority in favour of the decision without reckoning the vote of the interested party. Nor that the interested party withdrew before the decision, if he appear to have joined in discussing the matter with the other magistrates.

On appeal against an order, under stat. 4 & 5 Vict. c. 59, s. 1, directing the surveyor of the highways to pay the Commissioners of a turnpike trust a sum of money to be laid out in the actual repairs of the turnpike road, the justices making such order are interested parties.

So is a magistrate to whom money is owing which is secured upon the turnpike tolls.

H. HAWKINS, in last Easter Term, obtained a rule calling on the justices of the peace for the county of Hertford to show cause

(1) Appr. Hayman v. Governors of Rugby School (1874) L. R. 18 Eq. 28, 75. 43 L. J. Ch. 834.—A. C.

why a certiorari should not issue, to remove into this Court an order made at the general Quarter Sessions of the peace for the said county, \*on 8th April, 1844, on the appeal of James Smyth against an order of two of the said justices, whereby it was ordered (1) that 9l. 5s., part of the rate or assessment levied or to be levied under stat. 5 & 6 Will. IV. c. 50, should be paid by the surveyor of the highways of the parish of Bygrave, in the said county, to the Commissioners of the Baldock and Bournbridge Turnpike Trust, to be laid out in the actual repair of such part of the said turnpike road as lies within the said parish.

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The affidavits upon which the rule was obtained stated the following facts. One of the magistrates at Sessions, before whom the appeal was heard, was Mr. Fordham; he was also one of the magistrates who made the original order, and was a respondent in the appeal. Mr. Fordham, during part of the hearing, was in conversation with magistrates on the bench, and appeared to the deponent to take a part in the discussion as to the appeal. Another of the magistrates at Sessions was Mr. Fitzjohn: he was a creditor of the Baldock and Bournbridge Turnpike Trust, and had money owing to him which was secured solely upon the tolls of that trust. He sat on the bench during the hearing and trial of the appeal, and retired with the other justices into a private room after the hearing. The justices, on returning into Court from that room, confirmed the order, with costs. Statements were added to show that the objection to Mr. Fordham's and Mr. Fitzjohn's interference had never been waived.

[ \*755 ]

In answer, Mr. Fordham deposed that he was on the bench during part only of the appeal, having gone away before such hearing was concluded; and that he took no \*part in the determination. Mr. Fitzjohn deposed that he took no active part in the discussion or in promoting the determination, having only pointed out that the appellant had not attended the Petty Session to object; and he stated that he himself merely gave his vote as a magistrate; and that, when the magistrates retired into the private room to discuss the merits of the appeal, he took no part in the discussion, though he gave his vote in favour of confirming the order: that ten magistrates retired into the room; and that all but two voted for the confirmation.

<sup>(1)</sup> See stat. 4 & 5 Vict. c. 59, continued, by stat. 8 & 9 Vict. c. 59, to Cotober 1st, 1846, and to the end of the then next Session of Parliament.

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[ \*756 ]

Wordsworth now showed cause:

First, Mr. Fordham was a mere nominal party to the appeal, and had no real interest in the decision.

(LORD DENMAN, Ch. J.: He might be liable to costs (1).)

He took no part in the determination; and therefore it was not affected by his interest. Mr. Fitzjohn can scarcely be said to be interested. The money, when paid, would not go to satisfy his claim, nor to increase the general funds of the trust, but must be applied to the actual repairs of the road. But, admitting that he was interested, it appears that there was, without his vote, a majority for confirming the order. In Reg. v. The Cheltenham Commissioners (2) an order of Sessions was quashed because some of the magistrates were interested in the decision: but in that case without the votes of those interested there would not have been a majority for the order; and Patteson, J. expressly guarded himself against deciding that the vote of an interested party vitiated the decision when it could not affect the \*majority. A magistrate will not be called to account on a mere surmise that he must have influenced a decision on a question in which he is interested.

H. Hawkins, contrà, was stopped by the Court.

LORD DENMAN, Ch. J.:

I am clearly of opinion that this order of the Quarter Sessions must be brought up to be quashed. Both these gentlemen had a disqualifying interest. Mr. Fitzjohn, as a creditor, had an interest in the funds of the trust to which the money was to be paid. It is contended that, as the majority, without reckoning his vote, was in favour of the confirmation, the order is not vitiated. But, after making every possible deduction from the strength of my opinion, in deference to that of my brother Patteson, still in my judgment a decision is vitiated by any one interested person taking part in it. We cannot enter into an analysis of the different motives which may have produced the decision: it is enough to say that a single interested person has formed part of the Court. Then, next, Mr. Fordham, as respondent, might be liable to costs. I think the circumstances here deposed to are sufficiently strong to call upon him to show that he took no part in influencing the decision: and, even then, one would be sorry to see that a magistrate who was

(1) See stat. 4 & 5 Vict. c. 59, s. 3.

(2) 55 R. R. 321 (1 Q. B. 467).

nterested joined in the discussion at all. It probably never coursed to him that he was interested and disqualified. Still we nust take care that interested parties do not join in deciding cases. think that the *primâ facie* case is not answered by the fact that Ir. Fordham left the bench before the actual decision took place: or it is quite consistent with this that he may \*have joined in the iscussion so far as to affect the result.

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## ATTESON, J.:

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I suppose that, in Reg. v. The Cheltenham Commissioners (1), I was not satisfied that the interference of a single interested party was sufficient to invalidate the decision: in fact the interference of he interested parties did there turn the majority; and I suppose that I was satisfied with limiting my decision to that ground. But, on consideration, I think this is unsound: I think that it is very dangerous to allow an interested person to join, whether the majority turn on his vote or not. The magistrates discuss the question among themselves; and it is impossible to say what effect that discussion may have on the decison. The real question is, has an interested person taken any part at all? Here Mr. Fordham was a respondent, and ought to have taken no part. is urged that we are not to call a magistrate to account on a mere surmise: and to that I agree. But here is more than mere surmise. Mr. Fordham is on the bench in conversation with other magistrates. The party making the deposition upon which the order is impeached was probably not near enough to hear what was the subject of conversation. But, as the appeal was then being heard, it is at least probable that the conversation related to that: and the fair inference is that it did so, since Mr. Fordham does not deny it. With respect to Mr. Fitzjohn, he was interested, though, it is true, remotely. Mr. Wordsworth reminds us that the money was to be laid out in actual repairs, and not carried to the general funds of \*the trust: but I do not see what difference that can make, since every contribution to the repairs must relieve the general funds.

[ \*758 ]

## COLBRIDGE, J.:

I will merely add, as I was not present at the decision of Reg. v. The Cheltenham Commissioners (1), that I agree in the view now taken by my Lord and my brother Patteson. Whether there is a

(1) 55 R. R. 321 (1 Q. B. 467).

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properly constituted Court, is a question which must be prior to the decision. My brother Patteson does not appear to have differed very decidedly, in Reg. v. The Cheltenham Commissioners (1), from our present view: he there intimates that a magistrate who knows that he is interested, and still takes a part in the discussion, is not justified in saying that, because so many other magistrates were present, he could not have influenced the decision.

#### WIGHTMAN, J.:

I agree: and I meant, in Reg. v. The Cheltenham Commissioners (1), to rest upon the principle on which we are now deciding; that we cannot enter into a discussion as to the extent of influence exercised by the interested party.

Rule absolute.

1845. Jan. 15.

# REG. v. THE LANCASTER AND PRESTON JUNCTION RAILWAY COMPANY.

[ 759 ]

(6 Q. B. 759—768; S. C. 14 L. J. Q. B. 84; 3 Ry. Cas. 724; 9 Jur. 303.)

By a Railway Act (7 Will. IV. & 1 Vict. c. xxii.) it was enacted that, for settling differences between the Company and owners of land, the Company should issue a warrant commanding the sheriff to impannel, &c., a jury. which jury should "enquire of, assess, and give a verdict for the sum of money to be paid," "by way of satisfaction or compensation," "for the damages" sustained from the Company's acts. It was also provided that no proceedings had in pursuance of the Act should be quashed or vacated for want of form, or removed by certiorari. The Company issued their warrant to the sheriff, commanding him to impannel a jury "for the purpose of enquiring of, assessing, and giving a verdict for, the sum of moner (if any) to be paid" to C. "by way of satisfaction or compensation" "for the damages (if any) which shall have been done" &c. The jury, on the inquisition in pursuance of this warrant, found that C. "had not sustained any damage;" "therefore it was considered that no damages or sum of money be assessed" &c. Held:

(1) That the jury, even though the words "if any" had not been in the warrant, would still have been authorized to find that there was no damage.

And, consequently,

(2) That the words in the warrant did not vary the duty imposed upon the jury, or prevent the warrant from being in pursuance of the Act. Therefore,

(3) That the proceedings were within the jurisdiction conferred by the Act, and no certiorari lay.

ATHERTON obtained a rule, in last Term, calling upon the Lancaster and Preston Junction Railway Company to show cause why a certiorari should not issue, to remove into this Court an inquisition taken on 2nd July, 1844, "for the purpose of enquiring of, assessing,

(1) 55 R. R. 321 (1 Q. B. 467).

and giving a verdict for, the sum of money to be paid to James Cottam by way of satisfaction either for the damages (if any) done or sustained by reason of the execution of any of the works authorized by the Act passed" &c. (7 Will. IV. & 1 Vict. c. xxii.), "or for or on account of certain other damages, loss, inconvenience or injury therein mentioned, together with all proceedings had thereon."

The Company was incorporated by the style of "The Lancaster and Preston Junction Railway Company," by sect. 1 of stat. 7 Will. IV. & 1 Vict. c. xxii. (local and personal, public), "for making and maintaining a railway from the town of Lancaster to the town of Preston in the County Palatine of Lancaster." The Act gives the ordinary powers to enter and take lands, &c., for the purpose \*of the railway, making compensation, &c., and empowers parties to sell &c. Sect. 63 (1). "And for settling all differences which may arise between the said Company and the several owners and occupiers of or persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted; be it further enacted, that if any corporation, trustee or other person so interested or entitled and capacitated to sell, agree, convey, or release as aforesaid shall not agree with the said Company as to the amount of such purchase money or satisfaction or other compensation as aforesaid, or if any of the parties entitled to receive such purchase money," &c. "as aforesaid shall refuse to accept such purchase money," &c. "as aforesaid as shall be offered by the said Company, and shall give notice thereof in writing to the said Company within ten days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury, or if any of such parties as aforesaid shall for the space of ten days next after notice in writing shall have been given to the clerk," &c. "of any such corporation, or to any of such trustees or persons respectively, or left "&c., "neglect or refuse to treat or shall not agree with the said Company for the sale, conveyance, and release of their respective estates or interests " &c., " or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability," &c. "be incapable of making such agreement, conveyance, or release as shall be necessary or expedient for enabling the said Company to take such lands or to proceed in constructing the said railway " &c., or shall not disclose and \*prove the state of the title " &c., "or in

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any other case where agreement for compensation for damages incurred in the execution of this Act, or for the purchase of lands required for the purposes of this Act, cannot be made, then and in every such case the said Company shall and they are hereby required from time to time to issue a warrant under their common seal to the Sheriff of the said county of Lancaster, or in case such sheriff or his under-sheriff shall be one of the said Company," &c. (provision as to cases where presiding officers may be interested), "commanding such sheriff or coroner or other person to impannel, summon, and return, and the said sheriff, coroner, or other person, is hereby accordingly empowered and required to impannel," &c. "a jury of at least twenty-four sufficient and indifferent men, qualified according to the laws of this realm to be returned for trials of issues in his Majesty's Courts of Record at Westminster; and the persons so to be impannelled," &c., "are hereby required to appear before the said sheriff, under-sheriff, coroner, or other person at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons so to be impannelled," &c., "a jury of twelve men shall be drawn by the said sheriff, under-sheriff," &c., "or by some person to be by them respectively appointed, in such manner as juries for trials of issues joined in his Majesty's Courts of Record at Westminster are by law directed to be drawn; and in case a sufficient number of jurymen shall not appear at the time and place so to be appointed as aforesaid, such sheriff, under-sheriff," &c., "shall return other" &c. /de circumstantibus), "to make up the said jury to the number of twelve" (then follow provisoes \*as to challenges, summoning witnesses, and views); "and such jury shall, upon their oaths" (power to the presiding officer to administer oaths), "inquire of, assess, and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said Company from any other person, and aiso the sum of money to be paid by way of satisfaction or compensation. either for the damages which shall before that time have been done or sustained as aforesaid, or for the future temporary or perpetual or for any recurring damages which may be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said Company, and which cannot or will not be further obviated, removed, or repaired by them, which satisfaction or compensation for such damage or loss shall be inquired into and assessed separately and distinctly

from the value of the lands so to be taken or used as aforesaid; and the said sheriff, under-sheriff," &c., "shall accordingly give judgment for such purchase money, satisfaction, or compensation as shall be assessed by such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive to all intents and purposes upon all corporations and persons whatsoever." (Then follow provisoes as to notice.) "Provided also, that in all such cases the party claiming such satisfaction or compensation shall be the plaintiff, and shall be entitled to all such advantage and privileges as plaintiffs are in actions tried in any of his Majesty's Courts at Westminster by law entitled."

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Sect. 206 (1) enacts, "That no proceedings to be had or \*taken in pursuance of this Act shall be quashed or vacated for want of form, or be removed by *certiorari*, or by any other writ or proceeding whatsoever, into any of his Majesty's Courts of Record at Westminster or elsewhere; any law or statute to the contrary notwithstanding."

[ \*763 ]

The Company issued the following warrant:

"To the Sheriff of the County Palatine of Lancaster.

"We, the Lancaster and Preston Junction Railway Company, incorporated by an Act" &c., "do, by this our warrant (pursuant to the powers or authorities for that purpose given to us by the said Act), command you, the said sheriff, to impannel, summon and return a jury of at least twenty-four sufficient and indifferent men, qualified" &c., "to appear before you, the said sheriff, at" &c., "on" &c., "in order that you, the said sheriff, may, out of such persons so impannelled," &c., "swear or cause to be sworn twelve who shall be a jury for the purpose of enquiring of, assessing, and giving a verdict for, the sum of money (if any) to be paid to James Cottam, of " &c., "by way of satisfaction or compensation, either for the damages (if any) which shall have been done or sustained by reason of the execution of any of the works by the said Act authorized, or for or on account of any damage, loss, inconvenience or injury, by reason of the execution of any of the powers of the said Act, or for the future temporary or perpetual, or for any recurring, damages (if any) which may be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed or repaired by the said Company, and which cannot or will not be further obviated, removed or repaired by them (damages, loss, \*inconvenience or injury, in respect of

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(1) Cf. Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 145.

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which the said James Cottam hath already received satisfaction or compensation as required by the said Act, excepted)."

An inquisition was taken in pursuance of the warrant, and was set out in the affidavits as follows:

"Lancashire, to wit.—An inquisition and judgment, had, taken

and given at "&c., "on" &c., "before me, John Fowden Hindle, Esquire, Sheriff of the said County Palatine, pursuant and in obedience to a warrant made and issued under the common seal of the Lancaster and Preston Junction Railway Company, by virtue of an Act" &c., "and to me, the said sheriff, directed, to enquire into and of certain matters in the said warrant specified, by the oaths of Thomas Clark," &c., "twelve sufficient and indifferent men, qualified, according to the laws of this realm, to be returned for trials of issues in her Majesty's Courts of Record at Westminster, here duly impannelled, summoned and returned by me, the said sheriff, and being sworn and charged as in and by the said warrant directed; and which said warrant is hereunto annexed; to enquire of, assess, and give a verdict for the sum of money (if any) to be paid to James Cottam in the said warrant named, by way of satisfaction or compensation, either for the damages (if any) which should have been done or sustained by reason of the execution of any of the works by the said Act authorized, or for and on account of any damage, loss, inconvenience or injury by reason of the execution of any of the powers of the said Act, or for the future temporary or perpetual, or for any recurring, damages (if any), which might be so done or sustained as aforesaid, and the cause or occasion of which should have been in part only obviated, removed, or repaired by the said Company, and which could not or would not be further obviated, removed or repaired by the said Company (damages, loss, inconvenience or injury in respect of which the said James Cottam had then already received satisfaction or compensation, as required by the said Act, excepted): Whereupon the said jury, being so impannelled, summoned, returned, sworn and charged as aforesaid. upon their oaths did present, find and give their verdict, that the said James Cottam had not sustained any damage by reason or on occasion of the matters and things in the said warrant mentioned, any or either of them. Therefore it was considered that no damages or sum of money be assessed to the said James Cottam by reason of the matters and things in the said warrant contained, or any of them: whereupon I, the said sheriff, in pursuance of the said Act,

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do pronounce and give judgment accordingly. In witness whereof I, the said sheriff, have hereunto affixed my hand, and the seal of my said office, the day and year first above written.

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"JOHN FOWDEN HINDLE, Sheriff (L.S.).

"Signed by me, Christopher Bland Walker, Under-sheriff of the said County Palatine of Lancaster, presiding at the taking of the said verdict, and pronouncing the said judgment, the same day and year first before written.

"C. B. WALKER."

#### Baines now showed cause:

The affidavits merely set out the proceedings: and therefore the objections, if any, must arise only on the face of the inquisition. Three objections are suggested. First, that it does not \*appear that twenty-four jurymen were impannelled, as required by sect. 63, nor that the twelve named in the inquisition were drawn from twenty-four, or made up by a tales. Secondly, that the sheriff has pronounced the judgment, and not the under-sheriff, who appears, on the face of the inquisition, to have presided. that the jury have given no damages. Now sect. 206 forbids removal by certiorari; and, as this is manifestly a proceeding under the Act, the objections cannot be entertained by the Court; at any rate not in this proceeding. The alleged informalities will not warrant the removal: Rex v. Casson (1), Rex v. The Justices of the West Riding of Yorkshire (2), Reg. v. The Sheffield Railway Company (3). If the proceedings are not warranted by the Act, they are void, and a certiorari is unnecessary: Reg. v. The Bristol and Exeter Railway Company (4). (He was then stopped by the Court.)

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## Atherton, contrà:

The clause taking away the certiorari does not apply, because the proceedings are not instituted under the Act, and the jurisdiction has not arisen. Sect. 68 defines the functions of the jury: they have merely to ascertain the amount, and are not to enquire whether the complainant has or has not suffered any damages at all. The Company are to issue their warrant only in the case of damage existing: by issuing the warrant they admit the fact of some damage. It is true that the words "if any" have been

<sup>(1) 3</sup> Dowl. & Ry. 36.

<sup>(4) 52</sup> R. R. 314 (11 Ad. & El. 202,

<sup>(2) 1</sup> Ad. & El. 563.

note (a)).

<sup>(3) 52</sup> R. R. 310 (11 Ad. & El. 194).

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inserted in the warrant: and it may perhaps be argued that these words justify the \*jury in enquiring whether any damages at al! have been suffered. If that be so, it merely removes the question by one step: for then the objection will be that the warrant, so framed, is not in pursuance of the Act. The complainant by this proceeding is placed in a difficulty. If the Company meant to dispute the fact of damage altogether, they ought to have done so by refusing to issue the warrant: then there would have been an application for a mandamus, and the question as to the fact of damage would have been determined by this Court on the affidavits used in showing cause, or by a traverse to the mandamus. the enquiry has been transferred to a tribunal which was not intended to entertain such questions, and which is unfitted for The Courts will watch proceedings of this kind narrowly; them. the more so, as the finding is conclusive, and there are no means of applying for a new trial. If application were now made for a mandamus, the answer would be that the inquiry had already taken place; for the case is not like that of Walker v. The London and Blackwall Railway Company (1), where the sheriff would not allow the inquiry to proceed: here is a distinct finding.

(COLERIDGE, J.: That is, a finding which, if you are right, is not a finding justified by the Act. If so, it will not prevent a mandamus.)

The want of jurisdiction entitles the complainant to a certiorari.

There may be, upon examination of sect. 63, room for a little

# LORD DENMAN, Ch. J.:

more doubt than I at first could see: and perhaps it would have been better \*if the Company had issued their warrant without the words "if any." But these words make no difference as to the duty of the jury. They are to enquire and assess the damages: and, even if Mr. Atherton be right in his argument, that the issuing of the warrant admits the fact of some damage, that admission cannot bind the jury. The question, whether any damage has been sustained or not, is inseparable from the question, how much damage has been sustained. The words in the warrant, therefore, though it would have been better if they had been omitted, do not

alter the duty of the jury; and all parties are bound by this verdict.
(1) 61 R. R. 388 (3 Q. B. 744).

ad, if the proceedings show on their face a defect of jurisdiction, certiorari is not wanted.

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PATTESON, J. concurred.

#### DLERIDGE, J.:

The only questions are as to the form of the warrant and the onduct of the jury. The words "if any," though it would be etter if they were away, do not affect the validity of the warrant: or, though the inquiry may go only to the quantum, that quantum hay be nothing. Then the jury cannot be expected to give a arthing: strictly speaking, such a finding, if there were no amages, would be a violation of their oath as much as the finding f a large sum.

WIGHTMAN, J. concurred.

Rule discharged.

#### THOROGOOD v. ROBINSON.

(6 Q. B. 769-773; S. C. 14 L. J. Q. B. 87; 9 Jur. 274.)

Jan. 15.

1845.

It is not every wrongful act depriving a party of the possession of his goods that amounts to a conversion. Where plaintiff's goods and servants were on land which defendant recovered in ejectment, and defendant on entering under the writ of possession turned plaintiff's servants off the land, and would not let them remain for the purpose of removing the goods, there having been no subsequent demand or refusal: Held, that the jury might find that there was no conversion.

Case for an excessive distress, with a count in trover for lime, flints and breeze. Pleas, to the count in trover, 1. Not guilty.

2. Not possessed. Issues thereon. No question arose on the counts for an excessive distress.

On the trial, before Lord Denman, Ch. J., at the Middlesex sittings after last Michaelmas Term, it was proved for the plaintiff that he was a limeburner, and, in January, 1844, was in possession of some land and of the lime, breeze, &c., in the declaration mentioned, which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land, and, on the day mentioned in the declaration, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who, at the time, were loading a barge there with part of the lime. He refused to let them do any thing to the kiln fires, or put any more of the lime on the barge. The defendant's evidence

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showed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. The Lord Chief Justice told the jury that it was not every dealing with another person's goods that amounted to a conversion, but only such as deprived the real owner of them; that under the circumstances it was reasonable that the plaintiff should have applied to the defendant to have the articles which belonged to plaintiff delivered to him again; but that it was a question \*for the jury whether the conduct of the defendant was a conversion of the lime and breeze. Verdict for defendant on both issues.

Knowles now moved for a new trial on the ground that the verdict on both issues was against the evidence:

The Lord Chief Justice ought to have told the jury that the facts amounted to a conversion. Any act taking from a party even the temporary possession of his goods is a conversion: Keyworth v. Hill (1). [He cited 3 Stark. Ev. 1156 (2), Baldwin v. Cole (3).] As to the second plea: the defendant must be regarded as a mere wrong doer; he had never any title to the lime and breeze: the lime was indeed made from chalk dug \*on the premises; but it had been converted into an article of a different species; and, when a person makes wine, oil or bread out of another's grapes, olives or wheat, it belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials which he has so converted: 2 Black, Comm. 404.

# LORD DENMAN, Ch. J.:

In leaving this case to the jury, I endeavoured to act in conformity with the decision of this Court in the case of Needham v. Rawbone (4):

- (1) 44 R. R. 657 (3 B. & Ald. 685).
- (2) 3rd ed. 1842.
- (3) 6 Mod. 212.
- (4) Needham v. Rawbone, Mich. T. 1844. (Not reported.) The action was trover for wearing apparel, books and other goods. Plea, Not guilty. On the trial, before Lord Denman, Ch. J., at the sittings in Middlesex after Michaelmas Term, 1843, it appeared that the plaintiff had left his house, and, in it, the goods above mentioned, in the care of his servant. The defendant entered the premises, alleging an

authority from the Court of Chancery, placed a man in charge of the house, took an inventory of the goods, locked up the rooms containing them, prevented the plaintiff's servant from having access to the rooms, and finally obliged him to quit the premises leaving the property under the defendant's control. The LORD CHIEF JUSTICE thought there was no evidence of a conversion, and directed a nonsuit. Cockburn, in Hilary Term. 1844, obtained a rule nisi for a new trial. In Michaelmas Term, November

and I said that it was a question for the jury whether the \*conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them: if the defendant had then refused to deliver them or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion. I am inclined to think that the plaintiff is entitled to a verdict on the issue on the plea of Not possessed, which will probably be given up as it only affects the costs of that issue (1).

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## PATTESON, J.:

The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off.

## COLBRIDGE, J.:

Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's goods; what he was bound to do was, on demand, to let the plaintiff remove the goods; or to remove them himself to some convenient place for the plaintiff.

# WIGHTMAN, J. concurred.

Rule refused.

11th, 1844, before Lord Denman, Ch. J., Williams, Coleridge and Wightman, JJ.,

Whitehurst showed cause, and Cockburn and Petersdorff supported the rule. [Hartley v. Moxham, + Agar v. Lisle, † M'Combie v. Davies, § Baldwin v. Cole, || Keyworth v. Hill, ¶ and Fouldes v. Willoughby, \*\*\* were cited.]

Lord DENMAN, Ch. J. said it did not appear by the evidence that the plain-

tiff had not acquiesced in the taking, or that he might not have had the use of the goods if he had desired it.

Cur. adv. vult.

Lord DENMAN, Ch. J. in the same Term (November 25th), stated, without further observation, that the Court ordered the rule to be made absolute.

Rule absolute.

(1) This was agreed to on the defendant's part.

<sup>† 61</sup> R. R. 359 (3 Q. B. 701).

<sup>1</sup> Hob. 187, 5th ed.

<sup>§ 8</sup> R. R. 534 (6 East, 538).

<sup>|| 6</sup> Mod. 212.

<sup>¶ 44</sup> R. R. 657 (3 B. & Ald. 685).

<sup>\*\* 58</sup> R. R. 803 (8 M. & W. 540).

1843. Jan. 25. REG. v. THE INHABITANTS OF ST. LAWRENCE IN APPLEBY.

[ 842 ]

(6 Q. B. 842-845; S. C. 14 L. J. M. C. 56; D. & M. 394; 1 New Sees. Cas. 485; 9 Jur. 249.)

In stat. 6 Geo. IV. c. 57, s. 2, the words "separate and distinct" apply to "dwelling-house and building," but not to "land."

Therefore a settlement may be gained under that clause by one of two persons holding land jointly at a rent of 76l. paid by them in equal proportions, if the renting be in all other respects conformable to the statute

On appeal against an order of two justices, removing Mary, widow of George Liddle, and her five children from the township of Pollards Lands, in the county of Durham, to the parish of St. Lawrence in Appleby, in the county of Westmoreland, the Sessions confirmed the order, subject to the opinion of this Court on a special case.

The case set forth the examination of Robert Spence, step-father to the pauper's late husband, the material part of which was as "On the 1st day of February, 1829, by a certain lease dated on that day, and made between John Blenkarn Sedgwick of the one part, and me the said Robert Spence and the said George Liddle of the other part, the said J. B. Sedgwick demised and let to us, the said R. S. and G. L. deceased, a certain farm, consisting of a separate and distinct dwelling-house, and about seventy acres of land, be the same more or less, situate at Hoff in the parish of St. Lawrence, in the county of Westmoreland, for the terms of three years, three years and one year, at and for the rent or sum of 761. for the first term of three years, and at and for the rent or sum of 801. for the next terms of three years and one year. In pursuance of the said lease we, the said R. S. and the said G. L. deceased, on \*or about the 2nd day of February then next ensuing, entered into the possession and occupation of the tillage land of the said farm, and, on or about the 25th day of March then next ensuing, entered into the possession and occupation of the grass and herbage land of the said farm, and on or about the 6th day of April then next ensuing entered into the possession and occupation of the dwelling-house and buildings of the said farm, and continued to rent and occupy the same respectively for the first term of three years from the commencement thereof then next following at the rent mentioned in the said lease, when we gave up the possession The case then stated a residence by Liddle in the appellant parish during each year of renting. "The dwelling-house

[ \*843 ]

ipon the said farm was necessary for the proper cultivation thereof, .nd was hired and rented by us for that purpose, and was worth THE INHABI. bout 161. a year; and the land belonging thereto, independently of such dwelling-house, was well worth 60l. a year. I and the said 3. Liddle, during each of the said three first years that we so rented and occupied the said farm, paid the said yearly rent of 76l. for the same in equal proportions; and the said G. Liddle, in each and every of the said three first years, paid rent for the land which he so occupied jointly with me, independently of the said dwelling-house thereon, to the amount of about 301."

REG. TANTS OF LAWRENCE.

The case stated that, on the trial of the appeal, evidence was given of the material facts above set forth. The question reserved for the opinion of the Court was, whether or not G. Liddle gained a settlement in the appellant parish under the renting and occupation above mentioned.

W. H. Watson, in support of the order of Sessions, was stopped [ 844 ] by the Court.

#### Archbold, contrà :

The settlement is claimed under stat. 6 Geo. IV. c. 57, s. 2; but that clause enacts that no person shall become settled by renting a tenement "unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person" &c., "nor unless such house or building, or land, shall be occupied under such yearly hiring" &c.; the word "occupied" being applied to the two subject-matters of "house or building" and "land," without any thing to intimate a difference in the manner of occupation. The words "separate and distinct" must be applied to "land" as well as to dwelling-house or building; and a joint occupation of either will not suffice. The statute is remedial; and such a statute must be construed liberally, to "suppress the mischief and advance the remedy: " Heydon's This principle of construction was acted upon in Rex v. case (1). Threlkeld (2).

(LORD DENMAN, Ch. J.: What do you say is the mischief to be remedied by this Act?)

The disputes which had previously arisen as to settlement by renting of tenements, particularly in cases of joint occupation. The

(1) 3 Co. Rep. 7 a, 7 b.

(2) 4 B, & Ad, 229.

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beneficial object was pointed out in the preamble to stat. 59 Geo. III. c. 50, and is more completely carried into effect by stat. 6 Geo. IV. c. 57.

(COLERIDGE, J.: The questions which the Act of 6 Geo. IV. professes to remove are those created by the endeavour to make settlements depend upon the annual value instead of the rent paid.)

## [845] LORD DENMAN, Ch. J.:

The framers of the statute have studiously avoided saying what you would make them say. The order of Sessions must be confirmed.

Patteson, J. concurred.

## Coleridge, J.:

It would be very difficult to construe the statute as if the words were "consist of a separate and distinct dwelling-house or building, or of separate and distinct land."

WIGHTMAN, J. concurred.

Order of Sessions confirmed.

#### 1845. Jan. 29.

# IN RE HENRY PLEWS AND WILLIAM MIDDLETON.

(6 Q. B. 845-852; S. C. 14 L. J. Q. B. 139.)

[ 845 ]

Unprofessional arbitrators, appointed by an agreement of reference, ascertained, at a meeting, the balance due from A., one of the litigant parties, to B., the other, except a few pounds, which the arbitrators proposed to make payable by A. to B., on account of interest owing by A. to a third person, R., on a mortgage of land, the property of A., which A. was to assign to B. By arrangement between themselves, the arbitrators, without holding any further meeting, questioned R. separately, and in the absence of the parties, as to the amount of interest due; each then stated the result of his inquiry to the other, and, the reports agreeing, they made their award.

The COURT set the award aside on motion, as procured by "undue means," contrary to stat. 9 & 10 Will. III. c. 15, s. 2 (1), the course pursued having been inconsistent with natural justice.

An agreement of reference contained a clause for making such agreement a rule of Court. The award being published, and a motion about to be

(1) Repealed by the Arbitration and Sch. II.: see now s. 11 of that Act, 1889 (52 & 53 Vict. c. 49), s. 26, Act.—A. C,

made for setting it aside, the party interested in opposing such motion refused to produce the agreement for the purpose of its being made a rule. The Court, on motion in the Term next after the making of the award, permitted a copy of the agreement to be made a rule of Court, and granted thereupon a rule nisi for setting the award aside.

In re Plews

GODSON, in last Michaelmas Term, obtained a rule to show cause why the award made in this case (dated June 18th, 1844) should not be set aside on the grounds after stated. The material facts were as follows.

[ 846 ]

Disputes having arisen between Plews, a maltster and brewer, and William Middleton, an innkeeper, respecting certain accounts and money transactions, and certain securities given by W. Middleton to Plews on premises of W. Middleton, they, by agreement, referred the matters in difference to George Dodsworth, architect, and Christopher Middleton, mason, (arbitrators nominated one for each party) with power to them to appoint a third; which they did. The agreement stipulated that the parties and each of them should and would produce and deposit with the arbitrators all books, accounts, &c., relative to the premises in question, in their respective possession and power: and that each of them should and would submit to be examined upon oath. The arbitrators and the umpire, John Fawcett, mason, met, May 15th, 1844, and proceeded on the reference. Plews attended by attorney; but W. Middleton appeared only in person. Plews was called into the room (a private one in W. Middleton's house) in which the arbitrators and umpire sat; and they examined. with him, and compared with his books, the accounts between himself and W. Middleton. Plews, and other witnesses on his side, were examined without being sworn. W. Middleton was twice called into the room to answer questions, but was not present on either occasion more than two minutes, and was out of the room during all the rest By the affidavits on his part it appeared that of the proceedings. he was excluded; but the affidavits on the other side contradicted this. The arbitrators and umpire were satisfied with the accounts. balance appeared due from W. Middleton to Plews: and the referees were of opinion that Plews should take, in satisfaction of this balance, certain premises of W. Middleton \*already mortgaged by him to Plews, and should pay off a debt of 300l. and interest, secured by mortgage on the same property to Elizabeth Raper, who had been in receipt of the rents and profits.

[ \*847 ]

The affidavits in support of the rule stated that, the referees being unable at this meeting to ascertain the amount of interest due to Elizabeth Raper, it was determined that they should meet In re PLEWS.

again for the purpose of settling that amount, and upon other matters connected with the arbitration, and for the purpose of finally determining upon the award; but that the meeting was postponed on account of Dodsworth's inability to attend. That Christopher Middleton, the arbitrator on W. Middleton's part, was informed of this on June 1st. and no further communication was made to him till June 18th, when G. Dodsworth, the arbitrator on Plews's part, and Ramshay, Plews's attorney, produced to Ch. Middleton for his execution the award, already drawn up and signed by Dodsworth and the umpire. That, on Ch. Middleton complaining that a second meeting had not been held, they told him that they had considered it unnecessary, as Dodsworth had himself called on Miss Raper, examined her rent and interest account, and ascertained that a balance of 12l. 13s. 6d. was due to her for interest on the 300l. mortgage. Christopher Middleton deposed that he, being satisfied by Dodsworth and Ramshay of the correctness of this statement, executed the award. It was made conformably to the arrangement above stated, and ordered W. Middleton to convey his interest in the mortgaged estates to Plews, and to pay Plews 134l. 6s. 8d., stated to be the balance due from W. Middleton to Plews, "including the said mortgage of the said E. Raper;" and which sum was composed partly of the 12l. 13s. 6d. found due to Miss Raper for interest.

[848]

The affidavits in opposition to the rule denied that, on May 15th, it was agreed that any further meeting should be held. And they stated that, at the meeting of May 15th, the balance due from W. Middleton to Plews was ascertained to be 1211, 13s, 2d. exclusive of the interest owing to Miss Raper, and it was agreed that Christopher Middleton and the umpire should call upon Miss Raper that evening and ascertain the amount of interest from her accounts, and that Dodsworth should, at another time, ascertain it in the same manner for his own satisfaction, that the amount thus verified, together with 121l. 13s. 2d., should be the sum awarded, and that Ramshay should draw the award. Fawcett, the umpire, deposed that he and Ch. Middleton called on Miss Raper the same evening, but it was not convenient to her then to tell them the amount of interest, and Fawcett thereupon agreed with C. Middleton that he, C. Middleton, should learn the amount from Miss Raper and send it to Dodsworth (1). Dodsworth deposed

<sup>(1)</sup> Christopher Middleton's affidavit made no mention of the visit to Miss Raper.

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that he, after the meeting of May 15th, ascertained from Miss Raper the amount of interest, which "agreed, on being compared, with the amount noted down by the said Christopher Middleton "(1).

In re PLEWS.

[ \*849 ]

Among other grounds, stated in the rule nisi, for setting aside the award (2), were the following. 1. That \*no reasonable notice was given to William Middleton of the meeting of arbitrators on the 15th May. 2. That W. Middleton was excluded from such meeting. 3. That W. Middleton never received notice of any of the arbitrators' meetings, and that he was never present at any other of their meetings, and never had any opportunity whatever of being present or addressing them in support of his case. 4. That the arbitrators examined Henry Plews, and other witnesses, without having previously administered to them any oath. 5. That the said arbitrators examined the said H. Plews and his witnesses. more especially Elizabeth Raper and George Cumming, in the absence of the said W. Middleton. 6. (Not material.) 7. That George Dodsworth, one of the arbitrators, took evidence of witnesses in the absence of the two other arbitrators, and afterwards reported the same to them. 8. That G. Dodsworth, one of the arbitrators. and John Fawcett, the umpire, held a meeting at which Christopher Middleton, the other arbitrator, was not present, and, at such meeting, determined upon and made their award in the absence of the said Ch. Middleton, and without giving him any notice or affording him an opportunity of being present at such meeting. Two other grounds were assigned, which it is unnecessary to state.

#### Pashley now showed cause:

Assuming that the referees did wrong, the error does not amount the next Term. He cited Re Perring. †

(1) The affidavit did not further state any noting by Christopher Middleton, with respect to the interest.

(2) Godson, in moving for the rule (November 23rd, 1844), stated that the opposite party had possession of the agreement of reference, and would not produce it for the purpose of its being made a rule of Court, though the agreement provided that this should be done. In order that the opportunity of moving might not be lost by the lapse of a Term, he prayed that the Court would either receive a copy of the submission as the original, or permit the motion to be made in

(LORD DENMAN, Ch. J.: To avoid objections under the statute you had better move now.)

Godson then stated the grounds of motion.

Per Curiam (Lord Denman, Ch. J., WILLIAMS and COLERIDGE, JJ.): Rule nisi.

A verified copy of the agreement of reference was made a rule of Court; and the rule nisi was drawn up on reading (among other things) the rule so made.

In re PLEWS. [ \*850 ] to procurement \*of an arbitration or umpirage "by corruption, or undue means," within stat. 9 & 10 Will. III. c. 15, s. 2. At the meeting of May 15th there was a full disclosure of the accounts to the satisfaction of all the referees, and nothing remained to be settled but the question as to a few pounds' interest. A mistake in ascertaining a matter of such trifling importance will not vitiate the award: Atkinson v. Abraham (1). In Matson v. Trower (2) the umpire, after receiving from the arbitrators a statement of the points on which they disagreed, examined each of the parties in the absence of the other; and, in an action of assumpsit on the award, this was made a ground of objection: but Abbott, Ch. J. said: "It does not appear that either party desired to be present when the other was examined; legal men indeed usually examine one party in the presence of the other, but among mercantile persons a different practice prevails; the umpire here was a mercantile man, and the defendants not having expressed a desire to be present at the examination of the plaintiffs, cannot now object to its having taken place in their absence."

(LORD DENMAN, Ch. J.: That is very unlike Lord TENTERDEN'S views in general. You do not show any acquiescence here on the part of W. Middleton, who was only going in and out occasionally during the arbitration. And, if he did not acquiesce, were not undue means used?

COLERIDGE, J.: Upon these affidavits it would be strong to say that W. Middleton consented. In *Matson* v. *Trower* (2) each party was examined separately, and neither objected.

LORD DENMAN, Ch. J.: Each knew that he himself was separately heard; and neither could well object that the other was so treated.)

[\*851] In Hewlett v. Laycock (3) the \*arbitrators excluded the parties and their attorneys, and examined witnesses at the witnesses' own houses; but Abbott, Ch. J. held that this did not authorize one of the parties to revoke his submission.

(COLERIDGE, J.: The objection was taken too late.)

The principle of that case is adopted by the Court of Common Pleas in Bignall v. Gale (4).

(LORD DENMAN, Ch. J.: So is that of Atkinson v. Abraham (1),

(1) 1 Bos. & P. 175.

(3) 31 R. R. 695 (2 Car. & P. 574).

(2) 27 R. R. 725 (Ry. & M. 17).

(4) 58 R. R. 583 (2 Man. & G. 830).

expressly; but, when that case and Bignall v. Gale (1) were before us lately (2), we did not accede to their authority, but adopted a very different rule, laid down by Lord Eldon in the commencement of his career (3).)

In re

Arbitrators are not bound to the strictness which belongs to judicial proceedings in Court. An award ought not to be opened unless it be so notoriously against justice and the duty of an arbitrator that misconduct must be inferred: per Lord Ellenborough in Chace v. Westmore (4). Wilson, J. says, in Morgan v. Mather (5): "The only grounds" for setting aside awards "are, first, that the arbitrators have awarded what was out of their power; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption, as if without reason they will not hear a witness; thirdly, that they have proceeded upon mere mistake, which they themselves admit." As to the examinations without oath, the submission to arbitration did not empower the reference to administer an oath to any but the parties to the reference.

Godson, contrà, was stopped by the Court.

[ 852 ]

## LORD DENMAN, Ch. J.:

I think we are bound here by the principle which has been stated in argument against the rule. An award is procured by "undue means" if it is arrived at by a departure from natural justice in ascertaining the facts, as Wilson, J. suggests in Morgan v. Mather (6). Here, the ascertaining of facts by one arbitrator apart from the other, and by examination of an interested witness, was a departure, not merely from established courses of procedure, but from natural justice. The proceeding was not one by which a party to the reference ought to have been affected.

# PATTESON, J.:

I am of the same opinion. It is true that the erroneous proceeding related to a very small matter: but, if it were sanctioned in any instance, the referees in every case of joint arbitration might agree to carry on their inquiries apart, and, if they concurred in the result, decide accordingly. The rule must be made absolute.

- (1) 58 R. R. 583 (2 Man. & G. 830).
- (2) See Dobson v. Groves, ante, p. 509.
  - (3) Walker v. Frobisher, 5 R. R. 223
- (6 Ves. 70).
  - (4) 13 East, 357.
  - (5) 2 Ves. Jr. 15, 18.
  - (6) 2 Ves. Jr. 18.

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In re

COLERIDGE, J.:

To uphold this award would be to authorize a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other, and from the parties to the reference; whereas it ought to have been conducted by the arbitrators and umpires jointly, in presence of the parties (1).

Rule absolute.

1845. Jan. 29.

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## EX PARTE BATEMAN.

(6 Q. B. 853-859; S. C. 14 L. J. Q. B. 89; 2 Dowl. & L. 725; 9 Jur. 29.)

A person who has served an attorney under articles of clerkship, being at the same time a barrister, cannot claim to be admitted an attorney in virtue of such service; although he has been disbarred before making the application (2).

KNOWLES moved that an instruction might be given by this Court to the Examiners of attorneys, to examine Joshua Wigley Bateman with a view to his being admitted an attorney. The affidavits on which he moved set forth the following facts.

On September 2nd, 1826. Mr. Bateman was articled to Henry Hughes, an attorney and solicitor in Chancery, for five years. He served for three; and the articles were then determined by mutual consent: and, in October, 1829, Bateman entered as student of a college in Cambridge, where he took the degree of Bachelor of Arts in January, 1883. For about three years from that time he was engaged as a student in the chambers, respectively, of Mr. Dugmore and Mr. Duval, barristers; and in or about 1831 he was admitted a student of the Middle Temple, where he kept Terms for the purpose of being called to the Bar. He was called by that Society in May, 1835, and was in practice as a conveyancer from some time in 1886 to the end of 1842. At the end of that year he quitted his practice at the Bar, and did not afterwards engage therein; and, by articles of clerkship dated January 22nd, 1843, he bound himself to William Hughes Brabant, attorney at law and solicitor in Chancery, to serve him as articled clerk in his said profession for the term of five years from the date last mentioned, with a proviso for liberty on Bateman's part to determine the articles if at any time before the expiration of the five years he should, by virtue of his former and present service, \*or otherwise,

[ \*854 ]

<sup>(1)</sup> Wightman, J. was absent. Vict. c. 127), s. 3, and Solicitors Act.

<sup>(2)</sup> See Solicitors Act, 1860 (23 & 24 1877 (40 & 41 Vict. c. 25), s. 12.—A. C.

Ex parte BATEMAN.

be entitled to admittance as an attorney (1). He continued to serve Mr. Brabant as his clerk down to the present time, and was not, during such period, "engaged in any other practice, profession or business whatsoever." On the 17th of January instant he was disbarred, on his own petition to the Society of the Middle Temple. His not having previously applied to be disbarred "arose from inadvertence, and from his not being aware that such a course would be considered necessary in order to a valid service under his last-mentioned articles." The affidavit contained further averments, as to publication of notices.

The stamp on the original articles had been delivered up to the Commissioners of Stamps and cancelled, and allowed as a spoiled stamp under stat. 55 Geo. III. c. 184, Sched. Part I. tit. Articles of Clerkship (last clause so headed).

Knowles having stated the material facts,

[ 855 ]

Sir F. Thesiger, Solicitor-General, and F. Robinson showed cause in the first instance (2):

The three years' service under the first indenture cannot avail towards making up the required period. Mr. Bateman seems to have acted under the impression, that that instrument was useless when he took the benefit of that clause in the Stamp Act which enables parties to have the stamp on the first indenture cancelled, and treat it as a spoiled stamp. The unusual form adopted in the

(1) The clause was as follows. "And, whereas the said Joshua Wigley Bateman hath been advised that he may properly apply to the Court for the purpose of uniting a service under the present articles of clerkship with a service under former articles of clerkship" &c., "in order to make up a service of five years under articles, though the services for the two periods be not consecutive, and it is his intention, with the full consent and approbation of the said William Hughes Brabant, to make such application to the Court when and so soon as he shall have served for a sufficient period under the present articles: Now this indenture further witnesseth, and it is hereby agreed" &c., "that if at any time previously to the expiration of the said term of five years the said J. W. Bateman shall, by virtue of his

service for a period of three years as clerk to Henry Hughes, late of " &c., "gentleman, deceased, under certain articles of clerkship, bearing date the 2nd day of September, 1826, and made or expressed to be made between " &c., "and his service under this present agreement, or otherwise, be entitled to be admitted attorney and solicitor of her Majesty's Courts of Law and Equity at Westminster, or any of them, then and in such case it shall be lawful for the said J. W. Bateman immediately thereupon or at any time thereafter to determine and put an end to this agreement."

(2) It was understood that this was done to prevent injury to Mr. Bateman, by the application remaining suspended in consequence of the doubt entertained by the Examiners as to his admissibility.

Ex parte Bateman. last indenture shows the same consciousness. The ordinary course, on a second indenture, is to bind for such a time only as will make up the period not completed under the former articles. Here the party binds himself anew for the whole period of five years, though with a peculiar proviso. To make the second service available, Mr. Bateman should have been disbarred. It is against principle, and evidently tends to endanger the correctness of practice, that a party should be ready at one and the same time to perform the functions of a barrister, and to seek admittance as an attorney. There is no precedent for granting such an application. [They referred to Ex parte Cole (1) and Ex parte Warner (2).]

[ 856 ] Knowles, contrà:

Stat. 2 Geo. II. c. 28, sects. 5, 7 (3), imposes no other condition, as to clerkship, than that the party shall have been bound for five years to an attorney or solicitor, and have continued in such service. Where a person has been rejected as having held an office, or followed a business, incompatible with the study of his proper profession, the ground has been that he thereby adopted duties which required his time for inconsistent purposes. But the objection does not arise if he has only nominally held an office, which did not withdraw his attention from the requisite studies.

[He referred to In the matter of Taylor (4), William Fletcher's case (5), Richard Carter's case (6), and Ex parte Cole (1).]

# [857] LORD DENMAN, Ch. J.:

[ \*858 ]

The Examiners did very properly in bringing this question before the Court. The case is perfectly new. I do not think it any answer to the objection now raised, that there is no statutable disqualification to prevent this gentleman's admission. No \*imputation is thrown upon his conduct; but the position in which he has placed himself requires the Court to exercise its judgment whether a person so circumstanced ought to be admitted an attorney. The question does not turn upon the statute, but upon the power of admission belonging to the Court, and which involves the power of rejection. It is our duty to inquire, in a doubtful case of this kind, whether the course adopted is one which ought to exist and to become a precedent. In this case I think that it ought not. The

<sup>(1) 1</sup> Doug. 114.

<sup>(2) 6</sup> Jur. 1016. Bail Court, November 25th, 1842.

<sup>(3)</sup> See stat. 6 & 7 Vict. c. 73, s. 3.

<sup>(4) 5</sup> B. & Ald. 538. And see In the matter of Taylor, 4 B. & C. 341.

<sup>(5) 2</sup> W. Bl. 734.

<sup>(6) 2</sup> W. Bl. 957.

langer to which it leads is great and manifest; and, however we nay regret that a gentleman whose character appears free from all saint should be impeded in his course of exertion, or suffer any inconvenience, we are still bound to take care that no opportunity may be given for malversation, through the connection which may exist between barristers and gentlemen in the other branch of the There is, in the practice now before us, a danger of profession. that kind, which the Solicitor-General has adverted to. If a person in the situation of this gentleman thought proper at the end of two years' clerkship to continue at the Bar and practice, one cannot but see that the service in the attorney's office might lead to the most improper advantages. I feel confident, from what has been stated, that the remarks I make do not apply to this case; but we must look to the consequences which might ensue if the conduct pursued here were to become more general. The cases which have been cited (with the exception of Ex parte Cole (1)) do not apply. dispensing with articles lost or unstamped comes under a different consideration \*from any that belongs to this case. It would be cruel not to allow for accidents, and to permit a mere revenue objection to stand in the way, where the party was in no fault. But, in Ex parte Cole (1), a person who had been an attorney, and was struck off the roll at his own request, and called to the Bar, applied to be replaced on the roll, not having been first disbarred. Court refused to comply with his application, there being no instance of a barrister being admitted an attorney. Then, if the office of a barrister and that of an attorney cannot be held together, can a party who has held the office of barrister while serving as an attorney's clerk demand to be admitted an attorney in virtue of a service performed under circumstances in which he could not regularly have acted as a principal? It appears to me that this case is a strong authority against the present application, and that, exercising the discretion vested in us, we should be wrong in allowing it to be doubted for a single moment that the practice in question cannot be permitted, and that a person whose service as clerk has been performed while he was a barrister cannot avail himself of such service for the purpose of being admitted an attorney.

PATTESON and COLERIDGE, JJ. concurred (2).

Application not granted.

(1) 1 Doug. 114.

(2) Wightman, J. was absent.

Ex parte Bateman.

[ \*859 ]

1845. Jan. 31.

[ 860 ]

## RICHARD ADAMS v. WILLIAM ADAMS.

(6 Q. B. 860-867; S. C. 14 L. J. Q. B. 171.)

Lands were devised (before the Wills Act, 1837) to L. and his heirs, in trust to permit and suffer A. to take the rents and profits during A.'s life, "with this proviso, to pay" W., out of the same, an annuity for her life, and, if A. died before W., to permit W. to enjoy the lands for her life: and, after the deaths of A. and W., devisor gave and devised the lands to the heirs male of A., remainder over.

A. and W. both survived the devisor. A. survived W., and, after W.'s death, suffered a common recovery.

Held that, assuming L. to have had a legal estate during W.'s life, A. was legal tenant in tail male after W.'s death, and that the recovery barred the estate tail and remainders.

TRESPASS quare clausum fregit.

Pleas. 1. Not guilty. Issue thereon.

- 2. That the close was not the close of plaintiff. Issue thereon.
- 3. That the close was the close, soil and freehold of defendant. Replication traversing this. Issue thereon.

On the trial, before Coleridge, J., at the Devonshire Summer Assizes, 1843, a verdict was found for the plaintiff, subject to a case, which, so far as material to the point decided by the Court, was as follows.

Richard Adams was seized in fee of the close in question, and, having been twice married, died in 1791, leaving a widow, who died in 1792, and three sons, namely, William, his son by the first marriage, who died in 1797; Richard, his eldest son by the second marriage, who died in 1830; and John, his second son by the second marriage, who died a bachelor in 1823. William Adams, the defendant, is the eldest son of William: and Richard Adams, the plaintiff, is the eldest son of the last mentioned Richard, and heir-at-law of his uncle, the said John Adams.

The testator, Richard Adams, by his will, dated 26th December, 1790, gave and devised as follows.

"I give, devise and bequeath all those my freehold lands, hereditaments and premises, lying in Stoke Gabriel, to Samuel Lane, of" &c., "Richard Ford, of" &c. "John Jackson, of" &c., "and their heirs, upon trust for such persons and for such uses here mentioned, and for no other use, intent or purpose whatsoever. That is to say: \*permit and suffer my son John to take the rents, issues and profits of one dwelling-house, outhouses, barn, courtlage, one orchard adjoining, one close of land called Hartland, two closes of land called Long Astones, with common on Lidstone, one close of land called Wramslade, late converted to an orchard,

[ \*861 ]

during his life, subject with this proviso, to pay my wife, or her assigns, one annuity or yearly rent of four guineas of lawful money, clear of all outgoings, issuing out of the same, during her life, paid by four quarterly payments, the first quarter's payment to be paid the first quarter day after my decease, and to have the two chambers over my kitchen, with the household goods that are therein, and part of my other household goods, as many as she shall want for her use, during her life, with apples of my orchard, and any thing in my kitchen garden for her use, all during her life. If my son John dies before my wife, permit my wife to enjoy the above lands during her After my wife's and my son John's decease, I give and devise the above lands and premises to the heirs male of my son John, lawfully begotten of his body. In default of such issue male, permit and suffer my son William to take the rents" &c. (for the life of William, with a proviso to pay out of the lands two annuities to a grandson and granddaughter of devisor respectively, and, after William's death, the lands to the heirs male of William; remainder over).

The testator had been, for many years previously to the date of his will, in possession of Hartland, the close in question (and so called in the will), and died seised in fee of it, and in possession. Upon his death, his son John entered into possession, pursuant to the will, and continued so.

On the 24th May, 1810, by lease and release purporting to be for docking, barring and destroying the estate tail of the said John Adams, and all other estates tail, and all reversions and remainders, estates and contingencies thereupon expectant &c., the said John Adams conveyed the close in question, with other property, to Robert Brutton and his heirs, to the intent that he might become a perfect tenant of the freehold, so that a recovery might be suffered. And it was thereby declared that the recovery, &c., should enure to the use of such person, and for such estate and interest, as the said John Adams should by deed or will appoint, and, in default of such appointment, to the use of the said John Adams for life, and, after the determination of that estate, to the use of John Brutton and his heirs during the life of the said John Adams, upon trust for the said John Adams, and, upon the determination of that estate, to the only proper and absolute use and behoof of Richard Adams, the plaintiff, his heirs and assigns for ever.

In pursuance of this deed, a recovery was duly suffered in the ensuing Trinity Term of the premises in question, among others.

ADAMS t. Adams.

[ 862 ]

ADAMS v. Adams. John Adams remained in possession until his death in 1823. Richard Adams, the plaintiff, then entered into possession, and has continued so up to the present time. The act of trespass was admitted.

It was contended, at the trial, by the counsel for the defendant, that John Adams took an equitable estate only, for his life, under the will of Richard Adams, and a legal estate tail in remainder under the same instrument; and therefore that the recovery was inoperative to bar the estate tail or the remainder over.

[ 863 ]

The question for the opinion of the Court was, whether, with reference to this point, the defendant is entitled to the land, as heir-at-law of the testator Richard Adams, or as devisee under his will. If the Court should so think, a verdict was to be entered for the defendant on the second and third issues, otherwise to stand for the plaintiff. The verdict upon the other issue was to stand for the plaintiff.

The case was argued in this Term (1).

## Hodgson, for the plaintiff:

John Adams took a legal estate under the will; and, if so, the recovery was good. According to the rule in Shelley's case (2), John Adams had a legal estate in tail male at the time of the recovery if the limitation in the will gave him a legal estate for life. limitation is to Lane, Ford and Jackson, and their heirs, upon trust to permit and suffer him to take the rents, issues and profits during his life: that gives him a legal estate for life: Broughton v. Langley (3), PARKE, B. in Barker v. Greenwood (4). It would be otherwise if the three were directed to pay the rents; they would then take a legal estate: Jones v. Lord Say and Sele (5), Lord Kenyon in Doe d. Willis v. Martin (6). So, if a legal estate in trustees were required to protect contingent remainders, or if they were directed to permit a party to take the clear or net rents: White v. Parker (7), \*Barker v. Greenwood (8). It will be argued that, as the three devisees are to pay the widow four guineas annually for her life, they must take a legal estate. But, first, the

[ \*864 ]

- (1) January 17th. Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.
- (2) 1 Co. Rep. 93 b, 104 a. See 1 Fearne, Cont. R. 33, 34, 10th ed.
- (3) 2 Salk. 679; S. C. 2 Ld. Ray. 873.
  - (4) 51 R. R. 666 (4 M. & W. 421,
- 429). See note (17) and (s) to Jeffreson v. Morton, 1 Wms. Saund. 11 g (ed. 6).
- (5) 1 Ca. Eq. 384; S. C., more fully, 8 Vin. Abr. 262, tit. Devise, (C. b) pl. 19.
  - (6) 2 R. R. 324 (4 T. R. 39, 63, 64).
  - (7) 41 R. R. 636 (1 Bing. N. C. 573).
  - (8) 51 R. R. 666 (4 M. & W. 421).

payment is to be made by John Adams himself, not by the three devisees (1). And, if this be not so, they would hold the legal estate only during the life of the widow, who died before the recovery was suffered. In Doe d. Player v. Nicholls (2) copyhold land was devised to trustees, in trust for P., to be transferred to him when he should attain the age of twenty-one: and it was held that, on attaining that age, P. might be admitted without any act of the trustees. Doe d. White v. Simpson (3) is a strong instance of limiting the legal estate of trustees by the duration of the purposes of the trust. Those cases are inapplicable in which the purposes of the will required a complete dominion over the land, as where debts were to be paid out of the rents, and by sale from time to time: Wykham v. Wykham (4) was such a case. But, further, neither the three devisees nor the widow took any estate in the land itself: their legal estate, if any, was only a rent charge with power of distress, as in Buttery v. Robinson (5).

Crowder, contrà:

First. A devise to A. and his heirs in trust to permit B. and his heirs to take the rents and profits undoubtedly gives a legal estate in fee to B., unless something appear which shows that the \*use is not to be executed in B. but in A.: but, when that does appear, the direct limitation to A. in fee takes effect as a legal estate: Smith d. Dormer v. Packhurst (6), Doe d. Leicester v. Biggs (7), Biscoe v. Perkins (8). Thus, if the trust be to permit a feme covert to take the rents to her separate use, the trustees take the legal estate: Harton v. Harton (9), Robinson v. Grey (10): so, if the receipts of the cestui que trust are to be valid only with the approbation of one of the trustees: Gregory v. Henderson (11). And White v. Parker (12) and Barker v. Greenwood (13) are in accordance with the rule thus qualified. Here the trustees are to pay an annuity: the language of the will does not admit the supposition that the son is to pay (14). Next, if the trustees had a legal estate it did not expire

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- (1) Several parts of the will were referred to, as to this point, on both sides; but, as the Court, in deciding in favour of the plaintiff, assumed the point to be against him, it is not thought necessary to report this part of the argument at length.
  - (2) 25 R. R. 398 (1 B. & C. 336).
  - (3) 5 East, 162.
  - (4) 18 Ves. 395; see p. 414.
  - (5) 28 R. R. 656 (3 Bing. 392).

- (6) 3 Atk. 135.
- (7) 11 R. R. 533 (2 Taunt. 109).
- (8) 12 R. R. 279 (1 V. & B. 485).
- (9) 4 R. R. 537 (7 T. R. 652).
- (10) 9 East, 15.
- (11) 14 R. R. 665 (4 Taunt. 772).
- (12) 41 R. R. 636 (1 Bing. N. C. 573).
- (13) 57 R. R. 666 (4 M. & W. 421).
- (14) The argument on this point is omitted, for the reason before stated.

ADAMS Ø ADAMS.

\*865 ]

ADAMS T. ADAMS. at the wife's death. It is true that trustees take only so large a legal interest as the purposes of the trust require: but an event which renders the legal estate no longer necessary does not determine their legal estate, if the words of the will or deed give them a larger estate in the first instance: Doe d. Shelley v. Edlin (1). At any rate the trustees, to divest themselves of their legal estate, should have conveyed.

Hodgson, in reply:

[\*866] Warter v. Hutchinson (2) and Doc d. Noble v. Bolton (3) show that the legal estate of \*the trustees terminated at the widow's death, because the purposes of the trust, as contemplated in the will, were limited to her life.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

The case turned on the question, whether John Adams, the recoveror, had a legal or equitable estate when he suffered the recovery. The defendant argued that it was only equitable, because the use was executed in the trustees, who were required by the will to perform certain duties; and, though those duties had wholly ceased by the death of the wife before the recovery, still he contended that their estate continued, because originally limited to them and their heirs.

We wished for time to consider this argument, which appears to be now first urged, a circumstance not very consistent with its correctness, since, if it had been valid, many of the cases might have been affected by it. Parke, B., in Barker v. Greenwood (4), expressly holds that it makes no difference. "There is no doubt that the general rule of law is, that wherever there is a limitation to trustees, although with words of inheritance, the trustees are to take only so much of the legal estate as the purposes of the trust require." He refers indeed to no authority for this proposition: but a very little reflection on the nature of the case proves that he is right. For the manner in which an estate in fee is created is immaterial to this consideration. Whether created by implication or by express words, \*it will equally be executed in the cestui que

[ \*867 ]

<sup>(1) 43</sup> R. R. 432 (4 Ad. & El. 582, 589). See Doe d. Cadogan v. Ewart, 45 R. R. 789 (7 Ad. & El. 636, 666).

<sup>(2) 25</sup> R. R. 551 (1 B. & C. 721). See Warter v. Hutchinson, 23 R. R. 457

<sup>(2</sup> Brod. & B. 349).

<sup>(3) 52</sup> R. R. 307 (11 Ad. & El. 188). See Ackland v. Lutley, 48 R. R. 729 (9 Ad. & El. 879).

<sup>(4) 51</sup> R. R. 666 (4 M. & W. 429).

trust when it is held by the trustees, discharged of all personal duties in them, for the sole and direct benefit of the cestui que trust.

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The object of the testator, in the case, giving certain advantages to the widow, terminates with her life; and on her death the will becomes the same as if the words effecting that object had never appeared in it.

This our only doubt being removed, we are bound by all the decisions to hold that John Adams had the legal estate, the recovery was good, and the plaintiff must have judgment (1).

Judgment for plaintiff.

# FOSTER v. BANK of ENGLAND (2).

(6 Q. B. 878—879; S. C. 14 L. J. Q. B. 178 (sub nom. Fowler v. Bank of England); 2 Dowl. & L. 790; 9 Jur. 107.) 1845. Jan. 31. [ 878 ]

The Court will not allow, as a matter of right, that a plaintiff who sues in forma pauperis shall amend the declaration, after special demurrer thereto, without payment of costs.

The plaintiff sued in forma pauperis, and declared in case. The defendants demurred specially. Pearson, in last Michaelmas Term, obtained a rule nisi for leave to amend without payment of costs.

#### Borill now showed cause:

The defendants are unwilling to resist the application if the Court think it would be fit for them to assent as a matter of indulgence: and they are ready to pay back the costs if the plaintiff succeed in the action. But, the application being pressed as a matter of right, it is necessary to obtain the judgment of the Court on the law. In Pratt v. Delarue (3) the Court of Exchequer held that a pauper plaintiff was not subject to interlocutory costs. There reference was made to R. Hil. 2 Will. IV. I. 100 (4), which provides that, when a pauper omits to proceed to trial, pursuant to notice or undertaking, he may be called on to pay costs, though not dispaupered. Parke, B., in Pratt v. Delarue (3), appears to have considered that this was a new power, and confined to the particular cases specified. But the attention of the Court was not called to the older cases. These are collected in 16 Vin. Abr. 260, Paupers (C), and show that, where a pauper acts vexatiously, he is liable to

- (1) See Doe d. Davies v. Davies, 55 R. B. 300 (1 Q. B. 430); and stat. 7 Will. IV. & 1 Vict. c. 26, ss. 30, 31.
- (2) Cited in Jacobs v. Crusha [1894] 2 Q. B. 37, 39; 63 L. J. Q. B. 526.—A. C.
- (3) 62 R. R. 687 (10 M. & W. 509). [See note to Casey v. Tomlin, 56 R. R. 686.—A. C.]
- (4) 3 B. & Ad. 390. See Doe d. Lindsey v. Edwards, 2 Dowl. P. C. 471.

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[\*879]

pay costs, and also to be dispaupered. The amendment is in itself a mere indulgence: \*the plaintiff attempts to make the defendants pay for her own mistake.

Pearson, contrà :

Stat. 28 Hen. VIII. c. 15, s. 2 (1), provides that persons suing in formâ pauperis "shall not be compelled to pay any costs by virtue and force of this statute," (which gives costs to the defendant if the plaintiff be nonsuited or a verdict pass against him) "but shall suffer other punishment, as by the discretion of the justices or Judge, afore whom such suits shall depend, shall be thought reasonable." The immunity from costs is therefore a matter of right.

(Lord Denman, Ch. J.: We may refuse leave to amend, except upon payment of costs.)

The Court will not so exercise their power, the plaintiff being poor and the demurrer special.

## Per Curiam (2):

As a matter of right, we certainly should not allow the amendment without payment of costs. But, as the counsel for the defendants asks our advice, we would recommend that he allow the amendment without costs.

Borill .

The defendants will consent.

Rule absolute.

1845. *Feb*. 1.

[ 891 ]

#### FINDON v. M'LAREN.

(6 Q. B. 891-897; S. C. 14 L. J. Q. B. 183; 9 Jur. 369.)

To a plea in trover for a carriage, alleging that it was taken on the premises of B. as a distress for rent due from him, plaintiff replied that B. was a coachmaker and a commission agent for the sale of carriages, and exercised that trade on the said premises, and was employed by plaintiff, in the way of his said trade and business, for certain commission, to expose for sale and sell the carriage on the said premises, and plaintiff had delivered the carriage to B. for the purpose that he might there expose for sale and sell the same for plaintiff in the way of his said trade and business for certain commission, and B. had the same on the premises for that purpose, and the same remained thereon to be managed, and dealt with, sold and

<sup>(1)</sup> Repealed by 46 & 47 Vict. c. 49, ss. 3 and 4.

<sup>(2)</sup> Lord Denman, Ch. J., PATTESON, COLERIDGE and WIGHTMAN, JJ.

exposed for sale, as aforesaid, in the way of B.'s said trade and business, and not otherwise, until the time of the distress.

Findon c. M'Laren.

Held, that goods in the hands of a commission agent for sale in the way of his business are exempted from distress; and (on special demurrer) that the exemption was here sufficiently pleaded.

TROVER for a certain carriage called a cab, and for a cab head thereto belonging.

Last plea. That defendant, as bailiff of Edmund Lee, took the goods, on premises situate &c., as a distress for rent of the said premises, then due to Lee from John Bailey, his tenant thereof. Verification.

[ 892 ]

That, before and at the time of the making of the Replication. distress, the said John Bailey was a coachmaker and a commission agent for the sale of coaches and carriages for a certain commission and reward to him therefor paid, and the trade and business of such commission agent then in and upon the said dwelling house in the last plea mentioned exercised and carried on. And, the said J. B. being such commission agent as aforesaid, the plaintiff, shortly before the said time when &c., to wit on &c., did employ the said J. B. in the way of his said trade and business, for certain commission in that behalf, to expose for sale and sell in the said dwelling house the said cab and cab head; and for that purpose the said plaintiff, to wit on &c., had sent and delivered to the said J. B. the said cab and cab head for the purpose that the said J. B. might, in the said dwelling-house, expose for sale and sell the same for the plaintiff in the way of his the said J. B.'s said trade and business for certain commission and reward to the said J. B. payable in that behalf; and the said J. B. then had and received the said carriage for the purpose aforesaid in and upon his said dwelling house and premises, and the same remained and continued thereon to be managed and dealt with, and sold and exposed for sale, as aforesaid, in the way of his the said J. B.'s trade and business, and not otherwise, or for any other purpose whatever, from thence and until the making and levying of the said distress. whilst the said cab and cab head were in and upon the said dwelling house and premises for the purpose aforesaid, and before the same or either of them were sold or otherwise disposed of by the said J. B. in the way of his said trade and business, and before a \*reasonable time for that purpose had elapsed, the defendant, to wit at the said time when &c., of his own wrong seized &c. and converted &c.. which is the said grievance in the declaration mentioned, in manner and form &c. Verification.

[ \*893 ]

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Demurrer, assigning for causes: That the replication does not state or show, nor can it be collected therefrom, that the said trade and business of a commission agent, carried on by J. B. as in the replication mentioned, was a public trade, or that it was a trade ostensibly or otherwise carried on by him for the benefit of the public, or one in which the public was interested, nor that it was a trade which required or in the carrying on of which the said J. B. professed or was accustomed to or in which it was usual to receive coaches and carriages into the possession of the said J. B., or to expose them for sale on his premises, or that the said dwelling house was the place in which the said J. B. did in fact, or in which he professed or was known to, carry on the said trade and business, or that it was the place in which coaches and carriages were exposed for sale by him in the way of his said business; and also for that the said replication ought to have explained in what the trade and business of a commission agent consisted, and have shown that persons exercising the same were accustomed to receive the goods of other persons into their possession for the purpose of sale. also that the allegation that J. B. was a coachmaker is unnecessary to the replication and improper, and one which, taken in its connection in the said replication, tends to mislead the jury, &c. that it is consistent with the allegation in the said replication that the sale of coaches and carriages on commission, as \*carried on by J. B., was not the public or ostensible trade and business of the said J. B., but was merely ancillary and subordinate to his trade of a coachmaker, and exercised only in a private manner and to a limited extent; and the allegation that he was a commission agent for the sale of coaches and carriages for a certain commission &c. would be satisfied by proof that he acted as such in a few instances. although it was not his professed or ordinary calling. And also that the said replication does not allege that J. B., at the time of the said distress, carried on in the said dwelling house the trade and business of a commission agent. And also that the replication is ambiguous, and fails to show distinctly and explicitly whether the trade and business of the said J. B. consisted in making or in selling coaches and carriages, or that he carried on such trade in such a way as that the said cab and cab head would be, under the circumstances, privileged from distress, or whether the same were received, or whether they were, at the time of such distress. on the said premises for the purpose of being managed and dealt with by the said J. B. as a coachmaker or a commission agent, or both.

[ \*894 ]

Joinder in demurrer.

Lush, for the defendant:

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[ \*895 ]

The principles on which cases of this kind must be decided are laid down, and the authorities reviewed, in Muspratt v. Gregory (1); and, both in that case and in Joule v. Jackson (2), it was the opinion of the Courts that the exemptions already \*recognized were not to be extended. The only class of exemptions applicable here, among those stated in Simpson v. Hartopp (3), is the second, consisting of "things delivered to a person exercising a public trade to be carried wrought worked up or managed in the way of his trade or employ."

(Wightman, J.: What do you say is meant by a "public trade"?)

The party must hold himself out to the public as exercising it. They must know that the trade consists in receiving into possession the goods of other persons. In Gilman v. Elton (4) it was held (for the first time) that goods in the hands of a factor for sale were exempt from distress; but a factor is publicly known to be a person who receives goods for that purpose. And in Adams v. Grane (5) property on the premises of an auctioneer employed to sell it was held to be privileged; but the same remark applies to that case. Lord Lyndhubst, C. B. there referred to Gilman v. Elton (4), and said that "the principle which applies to the case of an ordinary factor, applies equally to the case of an auctioneer." Bayley, B. expressed himself to nearly the same effect.

(Wightman, J.: Do not the same observations apply to the business of a commission agent for the sale of carriages?)

A factor, or an auctioneer, is known to have goods of other persons on his hands for sale: but the law does not know that in the case of a commission agent; and the replication here does not state it.

(Wightman, J.: An auctioneer very often has not the goods for sale on his premises.)

- (1) 46 R. R. 435 (1 M. & W. 633; S. C. Tyr. & Gr. 1086). Judgment affirmed in Exch. Ch., Muspratt v. Gregory, 46 R. R. 460 (3 M. & W. 677). See Gibson v. Ireson, 61 R. R. 138 (3 Q. B. 39).
  - (2) 56 R. R. 757 (7 M. & W. 450).
- (3) 2 R. R. 466 (Willes, 512, 514). See S. C., as Simpson v. Harcourt, in
- the judgment of BULLER, J., in Gorton v. Falkner, 2 R. R. 463 (4 T. R. 568). Also Gisbourn v. Hurst, 1 Salk. 249, where the Court uses nearly the same words.
  - (4) 23 R. R. 567 (3 Brod. & B. 75).
- (5) 38 R. R. 624 (1 Cr. & M. 380; S. C. 3 Tyr. 326).

FINDON M'LAREN. [ \*896 ]

If he has them there, \*the public know that they are on the premises for sale.

(WIGHTMAN, J.: It is the same when they see a carriage in the rooms of a commission agent.)

Unless it is the known usage of the trade that goods should be on the premises for the purpose of sale, they are not privileged. averments here do not furnish any thing equivalent to the allegation of such knowledge.

Hoggins, contrà, was stopped by the Court.

LORD DENMAN, Ch. J.:

I think this comes within the principle of the auctioneer's case.

[ 897 ] PATTESON, J.:

> The principle of exemption has been applied to different cases from time to time, according to the existing state of trade. observed in the judgment of BAYLEY, B. in Adams v. Grane (1). And, here, the purpose for which the goods are stated to have been placed with the commission agent brings the case within the exemption.

WIGHTMAN, J. (2):

It is distinctly stated here that the plaintiff sent the cab to Bailey in order that he might expose for sale and sell the same in the way of his said business for commission and reward, and that Bailey had and received the same upon his premises for that purpose, and the same remained thereon to be managed, dealt with, sold and exposed for sale as aforesaid by Bailey in the way of his said trade and business, that is, of a commission agent. The case comes directly within that of the auctioneer.

Judgment for plaintiff.

1845. Feb. 4.

### DUNCAN v. LOUCH.

(6 Q. B. 904-916; S. C. 14 L. J. Q. B. 185; 9 Jur. 346.)

[ 904 ] Case for obstructing a right of way between two specified termini over a

close called the Terrace Walk. The way was claimed as appurtenant to a messuage, in general terms, without reference to any obligation to repair. On the trial of an issue joined on a traverse of the right of way, the easement

<sup>(1) 38</sup> R. R. 624 (1 Cr. & M. 380; (2) Coleridge, J. had left the Court. S. C. 3 Tyr. 326).

proved was a right to pass forwards and backwards over every part of the close, and not merely between the termini specified in the declaration; and it was shown that the easement was enjoyed under a grant thereof to D., his heirs, tenants and assigns, and to certain other persons, "he, they and every of them, from time to time, contributing and paying a rateable share and proportion towards repairing and amending the Terrace Walk."

Held no variance, the easement proved being only larger than the easement alleged, and not different in kind.

Held, also, that the obligation to repair was not in the nature of a condition precedent, and need not be alleged in the declaration.

The easement was granted in 1675; there was evidence that, for ten years next before the commencement of the action, part of the way claimed had become public.

Held not necessary to state in the declaration that such part had become public.

The first count stated that plaintiff, before &c., was, and still is, lawfully possessed of a certain messuage, &c., and by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from and out of the said messuage, &c., unto, into, through and over a certain street, &c., called Buckingham Street, and from and out of the said street, through a certain iron gate there, unto, into, through, over and along a certain close, situate, &c., called Terrace Walk, and from and out of the said last mentioned close unto and into a certain erection or building called the Water Gate, and so back again, from and out of the last mentioned erection, &c., unto and into the said close called the Terrace Walk as aforesaid; and from and out of the said last mentioned close, through the said iron gate, unto, into, through and over the said street called Buckingham Street as aforesaid, unto and into the said messuage, so in the possession of plaintiff, to go, return, pass and repass on foot, at all reasonable times of the day, at his free will and pleasure, as to the said messuage, &c., appertaining: yet defendant, well knowing &c., but wrongfully contriving &c., whilst plaintiff was so possessed, &c., to \*wit on &c. and divers other days &c., and at all reasonable times of the day, wrongfully, &c., caused and procured the said iron gate. to be locked, chained and fastened, and kept and continued &c., to wit from thence hitherto, and put up rails, &c., and kept and continued &c.; and thereby during all the time aforesaid the said way was and still is greatly obstructed; and plaintiff by means thereof could not, during the time aforesaid &c., nor can he now. have or enjoy his said way as he of right ought to have done, &c.

The second count claimed the same right of way as in the first count, with the addition of a right of going through the Water Gate Duncan r. Louch,

f \*905 ]

DUNCAN r. LOUCH.

[ \*906 ]

into and upon a certain public and navigable river there, to wit the River Thames, and back again.

The third count claimed a similar right of way as in the first count, unto and into the western portion of the Water Gate.

Fourth count. That plaintiff, before and at the time &c., was &c., and still is, possessed of another messuage &c.; and by reason thereof plaintiff, during &c., ought to have had and still of right ought to have the free liberty, &c., for him, his heirs, tenants or assigns, with others the inhabitants of certain premises called the York House and the grounds thereof, of passing and repassing on foot, at all reasonable times of the day, from and out of the last mentioned messuage &c., unto and into Buckingham Street, and from and out of the last mentioned street unto and into a certain close called the Tarris Walke, and of walking there, and of passing and repassing into and upon a certain erection, &c., called the Water Gate, next the river of Thames, at his and their free will and pleasure, as to the said last \*mentioned messuage, &c. appertaining; yet defendant, &c., on &c., wrongfully placed, &c., posts, &c., before and at the entrance of the Water Gate, and thereby prevented plaintiff from entering the same, and kept and continued &c.

Fifth, sixth and seventh counts. The fifth and seventh were similar to the first and third, but claimed the right of way from the messuage on to the Terrace Walk, without mentioning Buckingham Street: the sixth count was the same as the seventh, except that it claimed the right with respect to the eastern, instead of the western, portion of the Water Gate.

First plea, to all but the third and sixth counts, Not guilty. Issue thereon (1).

Second plea, to the first count, traversing the right of way claimed in that count. Issue thereon.

Third plea, to the first count, that plaintiff was not possessed of the messuage. Issue thereon.

Fourth plea, to the second count, traversing the right of way claimed in that count. Issue thereon.

Fifth plea, to the second count, that plaintiff was not possessed of the messuage. Issue thereon.

Sixth plea, to the fourth count, traversing the liberty in that count alleged. Issue thereon.

(1) The issues on the first, third, pleas were not material, those pleas fifth, seventh, eighth, tenth and twelfth being abandoned at the trial.

Seventh plea, to the fourth count, as to the placing one of the gates before the Water Gate: that the grievances were committed after the passing of an Act, 29 Geo. II. c. 90, "to enable the proprietors and inhabitants of houses in York Buildings," &c., "to make and levy a rate on themselves, sufficient to answer the expense of rebuilding or repairing of the Terrace Walk and Water \*Gate," &c., "and for keeping the same in repair for the future:" that a committee (appointed as was stated in the plea) of inhabitants, &c., being trustees for executing the Act, set up the gate to prevent nuisances &c.: and that an officer called the terrace keeper, appointed by the trustees, always had a key of the gate for the use of plaintiff, &c., as often as he or they have had occasion to pass, &c., and hath always unlocked, &c., as often as requested. Verification. Replication, traversing the nomination and appointment of the trustees. Issue thereon.

Eighth plea, to the fourth count, that plaintiff was not possessed of the messuage. Issue thereon.

Ninth and tenth pleas, to the fifth count, and eleventh and twelfth pleas, to the seventh count, respectively traversing the right of way and the plaintiff's possession of the messuage &c. in those counts respectively mentioned. Issues thereon (1).

On the trial, before Wightman, J., at the Middlesex sittings after Hilary Term, 1844, it appeared that the plaintiff was the owner of the house No. 15, Buckingham Street, Adelphi, abutting upon the Terrace Walk, and that he claimed the right of way set out in the declaration as appurtenant to the house, which he purchased in 1886. He proved a user of the way claimed ever since that time; he also proved that he was the representative, in respect of the said house, of one Philip Doughty, and put in a grant, dated March, 1675, containing the following words: "Together with the free liberty, use, benefit and privilege, for him the said Philip Doughty, his heirs, tenants or assigns, with \*other the inhabitants of York House and grounds, of the Tarris Walke of the Water Gate next the river of Thames, he, they and every of them, from time to time, contributing and paying a rateable share and proportion towards repairing and amending the same, with others who shall have the benefit thereof," &c. It was not shown that the plaintiff had ever been called on to contribute towards the repairs, or that any repairs had been required. In 1675, Buckingham Street was not built.

(1) There was a thirteenth plea, to issue thereon, not material here, on the third and sixth counts, and an which the defendant had a verdict.

DUNCAN % LOUCH.

[ \*907 ]

[ \*908 ]

DUNCAN v. LOUCH.

The property in the Terrace Walk was, by stat. 29 Geo. II. c. 90, vested in trustees for the purpose of raising a fund for keeping it in repair. No evidence was given in support of the seventh plea. appeared that Buckingham Street had, for the last ten years, been used as a public highway; but there was no evidence of its having been so used at any earlier period. It was argued, for the defendant, that the right of way claimed by the plaintiff in the first, second and fourth counts was merged in the public way across Buckingham Street, and that those counts were therefore not supported. The learned Judge was of that opinion, and directed a verdict for the defendant upon the issues on the second, fourth and sixth pleas, reserving leave to the plaintiff to move to enter a verdict It was also objected that the right proved was not a right of way, but a right to use the walk for pleasure only, and was therefore improperly stated in the declaration; and, further, that the grant was conditional only upon the grantee's contributing to the repairs, and therefore that the plaintiff ought in his declaration to have averred performance of the condition. The learned Judge overruled these objections, but reserved leave to the defendant to move to enter a verdict upon the issues raised upon the ninth and eleventh pleas, on which, and also on the issues raised on the first, \*third, fifth, seventh, eighth, tenth and twelfth pleas, the verdict was for the plaintiff.

[ \*909 ]

In Easter Term, 1844, Platt obtained a rule to show cause why the verdict on the issues raised upon the fifth and seventh counts should not be entered for the defendant; and Sir W. W. Follett, Solicitor-General, obtained a rule to show cause why the verdict on the issues raised on the first, second and fourth counts should not be entered for the plaintiff.

Ogle now showed cause against the defendant's rule:

The grantee of a right of way, granted on condition that he keeps the way in repair, is not, in pleading the right of way against a wrong doer or mere stranger, bound to show the condition, but may claim the right generally: and it appears from 1 Chit. Pleading, 395 (1) that he may do so even in declaring agains the owner of the soil. In practice the grantee never does set out such a condition in declaring against a stranger, though the obligation of keeping the way in repair, in the absence of express provision for repair, falls upon the grantee and not upon the granter; as it

is said in *Pomfret* v. *Ricroft* (1): "As in the case where I grant a way over my land, I shall not be bound to repair it, but if I voluntarily stop it, an action lies against me for the misfeasance." And Mr. Serjt. Williams, in note (3) on this passage (2), after observing that the principle is recognized in *Taylor* v. *Whitehead* (3), proceeds, "For by the common law he who has the use of a thing, as in this case the grantee of a way, ought to repair it."

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(COLERIDGE, J.: That is not a condition incident by law to the grant of a right of way; it is not even an obligation to which the \*grantee is subject: it is no more than this, that, if he wants the way to be repaired, he must repair it himself.)

[ \*910 ]

\* The defendant also contends that this is not a right of way at all, but a mere privilege for the plaintiff, like the other tenants, to walk on the terrace, contributing also, like them, to the repairs. What is the easement granted by the deed but a right of way? How otherwise could it be described in pleading? Besides, the evidence of user is such as entitles the plaintiff to a verdict independently of the deed.

### Peacock, contrà:

If this be a right of way, it is a right only of using the way for the purpose of passing from terminus to terminus, and not of walking for pleasure between the intermediate points. But the right is in fact one of a kind altogether different. It is like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the owners and tenants of the houses of walking about the garden, on condition of keeping it in order.

(COLERIDGE, J.: The allegation may be smaller than the proof. Has not the inhabitant of the square a right to cross the square, included in his right to walk about the square?)

If that be so, each inhabitant is entitled to repair the terrace walk: Pomfret v. \*Ricroft (4).

[ \*911 ]

(COLERIDGE, J.: He would, but for the stipulations in the local Act, vesting both the property and the right to repair in trustees.)

<sup>(1) 1</sup> Saund. 322.

<sup>(3) 2</sup> Doug. 745, 748.

<sup>(2) 1</sup> Wms. Saund. 322 c, 6th ed.

<sup>(4) 1</sup> Saund. 321.

DUNCAN r. LOUCH The privilege actually vested in the plaintiff, according to his case, does not extend to such a right of way as he has claimed: it is a right of a different kind. One who has a right of way over my land to close A. may not use it as a way to close B.

(LORD DENMAN, Ch. J.: The right as pleaded is unlimited, to walk, pass and repass at his and their free will and pleasure; there is nothing said about the particular occasions of walking: that is an exact description of the use which parties make of such a terrace.

Wightman, J.: Does it not come to this, that he has a right of way over every part of the land in question? (1).)

Secondly, the grant of the right was conditional, and the condition ought to have been set forth in the declaration; the defendants might then have pleaded non-performance. Thus, in covenant against a lessee for not repairing, under a covenant by him to repair, the lessor allowing and assigning him timber for the repairs, the lessor must aver in his declaration that he was ready to allow and assign him timber sufficient for the purpose: Thomas v. Cadwallader (2). The distinction taken in that case between mutual covenants and conditional grants is considered in Platt on Covenants, Part I. ch. 2, sect. v. (8). It is there said, p. 75. "Further, if a lessee for years covenants to repair, provided always, and it is agreed that the lessor shall find great timber, &c.: this makes a covenant on the part of the lessor to find great timber, by the word 'agreed'; and it will not be a qualification of the covenant of the lessee. But if the lessee covenants to repair, provided always that the lessor shall find great timber, without the word 'agreed,' this proviso shall not make any covenant on the part of the lessor, but it shall be only a qualification of the covenant of the lessee." Here there is not the word "agreed," nor any other word of covenant, so that, if this is not a condition, the trustees have no means of compelling the plaintiff to contribute to the repairs.

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DUNCAN v. LOUCH.

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Duncan v. Louch.

(Coleridge, J.: That raises the question whether this, if a condition, was a condition precedent: if it was, the declaration must show performance or excuse non-performance. Suppose the defendant to traverse the allegation of performance, would not such an issue be immaterial, as between the grantee and a stranger?

Patteson, J.: This is very different from a right of way with a qualification that the party shall pay a penny every time he uses the way: there he may not use the way till he pays the penny (1). Here he can have to contribute to repairs only when repairs are necessary; in the mean time he has a right to use the way without paying any thing. This, therefore, is a condition subsequent.)

The trustees would have no means of enforcing contributions.

(Wightman, J.: There is the word "paying;" would not that raise a covenant in law?)

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Holloway c. Turner. warrant of attorney. In Sandback v. Thomas (1), Lord Ellenborough said: "If, by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses." Here the incurring of costs by the plaintiff was a damage necessarily consequent upon the act of the defendant.

Jervis, contrà:

The plaintiff might perhaps have recovered these costs in another form of action, or by application to the Judge at chambers: the question is, not if there be any mode of recovering them, but how they can be a damage resulting from this trespass. Sandback v. Thomas (1) was an action on the case for maliciously holding to bail, in consequence of which the plaintiff was put to expense. But this is an action of trespass for a personal injury; and the plaintiff can recover only for what is part of that injury.

LORD DENMAN, Ch. J.:

I think there is no doubt here. The case cited does not apply.

The plaintiff might \*have recovered these costs in a proper form of proceeding, but he cannot sue the defendants for a trespass per quod he was put to expense in removing the cause of the trespass.

Patteson and Coleridge, JJ. concurred (2).

Rule absolute.

1845. *Feb*. 12.

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## COBB v. BECKE AND ANOTHER.

(6 Q. B. 930-937; S. C. 14 L. J. Q. B. 108; 9 Jur. 439.)

A., being defendant in an action brought by B., paid the debt and costs to his own country attorney for transmission to B. The attorney sent a cheque, exceeding the amount, to his own town agent, directing him to pay the debt and costs out of it. The agent acknowledged the receipt by letter to the country attorney, and therein promised to apply the money as directed: but he retained it in reduction of a debt due to him from the attorney:

Held, that there was no sufficient privity to support an action for money had and received by A. against the agent (3).

Assumpsit for money had and received. Plea, Non assumpsit.

On the trial, before Lord Denman, Ch. J., at the London sittings after Hilary Term, 1844, it appeared that one Cutbush had brought

- (1) 18 R. R. 771 (1 Stark. N. P. C. 306).
  - (2) Wightman, J. was absent.
- (3) Semble, the client can apply to the Court to compel payment by the
- exercise of its summary jurisdiction over its own officer: Exparte Edwards
- (1881) 7 Q. B. D. 155, 51 L. J. Q. B.
- 108, affd. 8 Q. B. Div. 262.—A. C.

an action against the plaintiff Cobb, in which Dally, of Maidstone (1), was Cobb's attorney. The defendants were the London agents of Dally. The proceedings in the action were, eventually, stayed on payment of debt and costs, amounting to 17l. 18s. 4d. The money was paid by Cobb to Dally for the purpose of complying with these terms; and Dally thereupon transmitted to the defendants his own cheque for 20l., with directions to pay the amount of the debt and costs to Cutbush's attorney. The defendants wrote the following letters to Dally.

"Cobb ats. Cutbush.

"Feb. 24, 1843.

"Dear Sir,—We have received the 201., which shall be applied as you direct. We have applied to plaintiff's \*agents to tax the costs, and think the proper construction of the order is, that the 171. 18s. 4d. is to be included with the other amount. Yours truly, "Broke and Flower."

" Cobb ats. Cutbush.

"March 4, 1843.

"Dear Sir,—We have applied to plaintiff's agents, enquiring when they intend to tax the costs; but they say the delay is their own: we expect, however, notice daily. We did not think that the 17l. 18s. was to be paid down; but, as plaintiff's agents are aware that defendant considers it is, they will, of course, insist upon the payment. We are &c.

"Becke and Flower."

The defendants, however, instead of paying over the money, retained it in satisfaction of a balance due from Dally to them, on a general account of agency business. The following correspondence then took place between the defendants and the attorneys of Cutbush, who afterwards became the attorneys of the plaintiff in this cause.

" Cutbush v. Cobb.

"June 8, 1848.

"Dear Sires,—Mr. Dally advises us the defendant has remitted to you, on the plaintiff's account, the sum of 201.: please send us a cheque in the course of the morning. We are &c.

"Fyson and Curling.

"Messrs. BECKE and FLOWER."

"June 10, 1848.

"DEAR SIRS,—Mr. Dally is incorrect in stating that we received on plaintiff's account 201.: we received that sum on his own

(1) Probably Rochester; see judgment, p. 609, post, and 14 L. J. Q. B. 109.

-F. P.

Cobb v. Becke.

[ \*931 ]

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COBB C. Brckr. account; and he instructed us to pay your clients a certain sum out of it: but, inasmuch as he has given us notice of applying to the Court of Bankruptcy to relieve himself of our demand (upwards of some hundreds), we do not (as you may well suppose) feel inclined to increase our debt. We think it hard upon defendant, who, very probably, has paid Mr. Dally the amount claimed; but it would be still harder upon us, who are such great sufferers, to lose this sum. We are," &c.

"BECKE and FLOWER.

"Messrs. Fyson and Curling."

"June 12, 1843.

"Dear Sirs,—We have received your letter, in which you state that the remittance of 20l. we requested you to pay us was made on Mr. Dally's account, and not on account of the plaintiff: but we have in our possession your letter to Mr. Dally, in which you say, 'Cobb ats. Cutbush. We have received the 20l., which shall be applied as you direct.' We must refer you to his letter of instructions, and beg you will send us a cheque without further delay. Yours truly,

"Fyson and Curling.

"Messrs. Becke and Flower."

The jury found that the defendants knew that the money remitted to them was the plaintiff's. A verdict was taken for the plaintiff, subject to a motion to enter a nonsuit. In the following Term,

[ 933 ]

Jervis obtained a rule nisi accordingly, referring to Williams v. Everett (1). In this vacation (2),

Martin and Butt showed cause:

The relation between the attorney and town agent is peculiar, and gives the agent a delegated authority, which creates a privity, for some purposes, between him and the client, just as much as if the client had remitted the money directly to his agent. A similar objection was made in *Moody* v. *Spencer* (3), and overruled. Lilly v. Hayes (4) is also an authority on this point. There the defendant was held liable to pay the plaintiff moneys remitted to him for that purpose; and the ground of liability was, that the defendant knew of the intended application of the moneys, and

- (1) 13 R. R. 315 (14 East, 582).
- (2) February 5th, 1845. Before Lord Denman, Ch. J., Patteson and Coleridge, JJ. Wightman, J. was
- sitting at Nisi Prius.
  - (3) 2 Dowl. & Ry. 6.
  - (4) 5 Ad. & El. 548.

promised to pay accordingly. Sadler v. Evans (1) shows only that the title to property cannot be tried by an action of indebitatus assumpsit against a mere collector of the adverse claimant. The cases go to the extent of this proposition,—that, where A. sends money to his friend B. to pay C., and B. promises A. to pay it to C., there B. is liable directly to C.

COBB v. Becke.

[ \*934 ]

(Patteson, J.: That is going very far. Your doctrine would almost go to the extent of making a banker liable for his customer's debt, whenever the customer makes a remittance to the banker to pay it.

### Keating, contrà:

The money remitted to the defendant was not the plaintiff's. It was a cheque for \*a different and larger sum, out of which the defendants were to pay the same amount that the plaintiff had paid to Dally. If Dally had sued the defendants, they could not have set up the title of the plaintiff. There is so little privity between the agent and the country attorney's client, that payment of debt and costs by a defendant to the agent of the plaintiff's attorney is not payment to the plaintiff: Yates v. Freckleton (2), Scrace v. Whittington (3). The fact that the defendants knew the money to belong to the plaintiff is immaterial. In Heath v. Chilton (4) the defendant was held not liable to an action by three executors for money which he knew to belong to the executors generally, but which he had received under the authority of two of them The general rule is, that no one can call an agent to account but his own principal; a rule established by many cases, and illustrated by Stephens v. Badcock (5), Edden v. Read (6), Howell v. Batt (7), Sims v. Brittain (8).

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

The facts of this case appear to be as follows. The present plaintiff Cobb being defendant in an action at the suit of one Cutbush, and a Mr. Dally of Rochester being Cobb's attorney, and the present defendants being Dally's agents in London, an order

- (1) 4 Burr. 1984.
- (2) 2 Doug. 623.
- (3) 35 R. R. 556 (2 B. & C. 11).
- (4) 12 M. & W. 632.
- (5) 37 R. R. 448 (3 B. & Ad. 354). See Bamford v. Shuttleworth, 52 R. R.
- 542 (11 Ad. & El. 926); Wakefield ▼. Newbon, ante, 379.
  - (6) 3 Camp. 339.
  - (7) 5 B. & Ad. 504,
  - (8) 4 B. & Ad. 375.

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COBB v. BECKE. [\*935] was made \*for staying proceedings on payment of debt and costs. Cobb paid money to Dally for this purpose; upon which Dally sent to the defendants his own cheque for 20l., being somewhat more than the debt and costs (which turned out to be 17l. 18s. 4d.), directing them to pay the debt and costs. They acknowledged the receipt to Dally by letter, and said that the money should be applied accordingly. Afterwards they retained it in satisfaction of a balance of general account due to them from Dally. Cobb brought this action for money had and received: and on the trial the jury found that the defendants knew the money remitted to them to be Cobb's. The question is, whether there is sufficient privity between Cobb and the defendants to sustain this action.

The general rule undoubtedly is, that there is no privity between the agent in town and the client in the country: the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence. therefore, is necessary, beyond the mere relation of the parties to each other, as above stated, to make the agent in town liable to If Cobb had transmitted the money direct to the defendants, or if he had desired Dally to transmit it to them specifically, and they had received it as from Cobb and not as from Dally, doubtless they would have become Cobb's agents and accountable to him for the appropriation of it. But, upon the evidence, it appears that Cobb paid the money to Dally for the purpose of paying the debt and costs, but without any specific directions through what channel it was to be remitted. money appears to have been mixed with Dally's general funds; and he sent to the defendants his own \*cheque. liberty to have sent the money through his bankers, or direct to Cutbush's attorney, or through any channel which he chose to select: and, unless the person through whom he sent, be he who he would, became, by the employment of Dally, the agent of Cobb, it seems difficult to contend that the defendants became so.

[ \*936 ]

The case of Lilly v. Hays (1), as well as those of Williams v. Everett (2), Baron v. Husband (3), and Howell v. Batt (4), turned entirely on the question, whether the defendant had entered into any binding engagement to hold to the use of the plaintiff money which had been transmitted to him, by a third person, for the plaintiff, and are not applicable to the present case, in

<sup>(1) 5</sup> Ad. & El. 548.

<sup>(3) 4</sup> B. & Ad. 611.

<sup>(2) 13</sup> R. R. 315 (14 East, 582).

<sup>(4) 5</sup> B. & Ad. 504.

which there has been no direct engagement entered into by the defendants at all.

COBB r. BECKE.

The case of *Moody* v. *Spencer* (1) differs from the present in this, that there the defendant, the town agent, had received money, in the course of the suit, from the opposite party for the client. It could not be said that the town agent received it to the use of the attorney in the country; and, as it was not received on his (the agent's) own account, it must be treated as received to the use of the client.

It is not pretended that an agent can delegate his authority, or that he can, by employing a third person to do the whole or any part of the business entrusted to him, make that third person an agent of his principal. But it is argued, for the plaintiff, that Dally was merely the hand employed to forward the plaintiff's money to \*the defendants, to be by them employed in payment of the debt and costs. If the facts warranted such a conclusion, doubtless this action might be maintained. But, as the facts show that the plaintiff employed Dally, and that Dally, and not the plaintiff, employed the defendants, we are of opinion that no privity is established between the plaintiff and defendants, and that the rule for a nonsuit must be made absolute.

Rule absolute.

# DOE D. MUSTON v. HARRIET GLADWIN (2).

(6 Q. B. 953-963; S. C. 14 L. J. Q. B. 189; 9 Jur. 508.)

Lessee of buildings covenanted in the lease to "insure and continue insured" such buildings in the joint names of himself and the lessor, his executors &c., or assigns; and there was a provise for re-entry on breach of the covenant. The lessee insured in his own name singly, but showed the policy to the lessor, who approved of it, and accepted rent during the next three years ending at Christmas, 1842. The premiums of insurance were duly paid up to that time, the premium at Christmas, 1842, covering the year 1843, and the policy continuing unaltered. In January, 1843, the lessor assigned; and the assignee, in the same year, brought ejectment for a forfeiture incurred by not insuring in the joint names. No notice had been given to the lessee to alter the policy: Held,

That the covenant to insure in the joint names was a continuing covenant, and was not waived by the conduct of the lessor, except as to past breaches. And that the ejectment lay.

EJECTMENT for messuages &c. in Kent. Declaration of Trinity Term, 1843: demise, May 18th, 1843.

On the trial, before Lord Denman, Ch. J., at the Maidstone

(1) 2 Dowl. & Ry. 6.

116, 32 L. T. 119; cp. Penniall v.

(2) Dist. Walrond v. Hawkins (1875)
 L. R. 10 C. P. 342, 349, 44 L. J. C. P.

Harborne (1848) 11 Q. B. 368.—A. C.

[ \*937 ]

1845. Feb. 5. March 1.

[ 953 ]

DOE d. MUSTON r. GLADWIN. [\*954]

\*Spring Assizes, 1844, it appeared that this ejectment was brought on the alleged forfeiture of a lease by which defendant held the The defendant was the widow and executrix of Thomas Gladwin. The lease purported to be granted, December 7th, 1819, by Lancelot Loat to Thomas Gladwin, his executors, administrators and assigns, in consideration of the expense which the said T. G. had been at and put to in erecting and building an ice well and other erections and buildings in and upon the piece of land or ground thereinafter described and intended to be thereby demised: and also in consideration of the yearly rent and covenants thereinafter reserved and contained, and on the part of the said T. G., his executors, &c., to be paid, kept, done and performed. The term was thirty-five years; the rent 4l. 4s., payable on the usual quarter The lease contained the following covenant by the lessee. "And also that he the said Thomas Gladwin, his executors," &c., "shall and will from time to time and at all times during the said term, at his or their own expense, well and sufficiently insure and continue insured in the joint names of himself, his executors, administrators or assigns, and the said Lancelot Loat, his executors. administrators or assigns, all erections and buildings, except the ice well before described, which shall or may during this demise be erected and built on the said premises hereby demised, or on any part thereof, during the said term, against loss or damage by fire, in some respectable insurance office "&c. There was a proviso for re-entry if Thomas Gladwin, his executors, &c., should not perform all and every the covenants &c. The lessor of the plaintiff alleged as a breach \*of covenant (1) that the premises had not been insured or continued to be insured in the joint names of the persons in whose joint names the same ought to have been insured.

[ \*955 ]

The defendant became tenant on the death of Thomas Gladwin, and, on 28th January, 1836, effected an insurance in her own name and in no other. The policy was continued in that form till the bringing of the present action; and the premium was paid, December 27th, 1842, for the ensuing year. The reversion of the demised premises came to George Oliver by assignment in 1837; and he assigned to the lessor of the plaintiff on 18th January, 1843. In 1839, Oliver's attorney wrote to the defendant, requiring her to insure in her own name and that of Oliver: but it was proved on the defendant's part that, in the spring of 1840, the policy, in the defendant's sole name, was shown to and approved

<sup>(1)</sup> In a particular of breaches delivered under a Judge's order.

of by Oliver, and that he had subsequently, and down to January, 1843, accepted rent from the defendant, the last payment being for the rent due at Christmas, 1842.

DOE d. Muston r. Gladwin.

It was urged on the defendant's behalf that the alleged forfeiture had been waived by Oliver, and could not be enforced by the lessor of the plaintiff till after express notice to insure according to the covenant, which notice did not appear to have been given. The LORD CHIEF JUSTICE directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant. Platt, in the ensuing Term, moved accordingly; and a rule nisi was granted. In this vacation (1),

#### W. H. Watson and Peacock showed cause:

[ 956 ]

The covenant to insure and keep insured was a continuing covenant; and, therefore, if there was a waiver of forfeiture by Oliver in 1839, that did not extend to subsequent forfeitures: Doe d. Flower v. Peck (2) proves both these points, and agrees with Doe d. Ambler v. Woodbridge (3). And the supposed assent here, if it went farther than the waiver of a past breach, must be relied upon as a parol dispensation with a contract under seal, which is contrary to the established rule of law: West v. Blakeway (4). Accord and satisfaction after breach is an answer to an action of covenant, but not accord and satisfaction before: Com. Dig. Accord (A 1), (A 2): the reason is stated in Blake's case (5), that, where the breach gives only a right of action for damages, accord after breach is only an acceptance of amends for the damages; but accord before is a dispensing with the covenant, which cannot be done by parol: and this doctrine was acted upon in Kaye v. Waghorn (6). The distinction between waiver of a power of re-entry after breach and a prospective dispensation is also pointed out in note (16) to Duppa v. Mayo (7). West v. Blakeway (4), in an equitable view, was more strongly in favour of the defendant than this case, because there the party who brought the action had directly sanctioned the breach of covenant. Perhaps the transaction here between Oliver and the defendant might raise an equity between themselves: but it could not destroy the covenant as between the defendant and an assignee of the reversion.

<sup>(1)</sup> February 5th. Before Lord Denman, Ch. J., Patteson and Coleridge, JJ.

<sup>(2) 35</sup> R. R. 359 (1 B. & Ad. 428).

<sup>(3) 33</sup> R. R. 203 (9 B. & C. 376).

<sup>(4) 58</sup> R. R. 563 (2 Man. & G. 729).

<sup>(5) 6</sup> Co. Rep. 43 b.

<sup>(6) 10</sup> R. R. 558 (1 Taunt. 428).

<sup>(7) 1</sup> Wms. Saund. 288 a. b.

DOE d. MUSTON v. GLADWIN. [ 958 ]

[ \*959 ]

Bovill, contrà:

First, this case falls within the authority of Doe d. Knight v. Rowe (1). Abbott, Ch. J. there said: "I am of opinion, that there is not in this case any dispensation or release from the covenant; nevertheless, if in this a case of forfeiture, the conduct of the lessor of the plaintiff has been such, as to induce a reasonable and cautious man to believe, that he would do all that was necessary or required of him, by insuring in his own name and to the amount which has been proved, I am of opinion that, in point of law, the lessor of the plaintiff is not entitled to your verdict." "Knight might not have meant to deceive in this respect, but still if it would lead a reasonable man to the conclusion that has been stated, then as regards this ground of forfeiture, your verdict should be for the defendant." This ruling has, indeed, been questioned in Roscoe on Evidence, 432; but that of Lord DENMAN, Ch. J. in Doe d. Pittman v. Sutton (2) was to the same effect. \*The principle is that of Pickard v. Sears (3), and many other cases, in which it has been held that no action can be maintained for things done under a misconception which the plaintiff himself has assisted in creating. In Doe d. Morecraft v. Meux (4) there were two independent covenants, to repair, and to repair on three months' notice, with a proviso for re-entry if either were broken. The defendant would clearly have been liable to ejectment under the first, but was held to be protected, because the landlord, by giving him notice to repair within three months, had led him to believe that he was in a state of security. Here the defendant acted on such a belief, created by Oliver, down to the end of 1842, when the premium for 1843 was paid: and no cause of complaint against her existed when the lessor of the plaintiff became landlord.

(Patteson, J.: You do not put the landlord's conduct as a dispensation; and yet you assert what clearly amounts to one; an engagement by the landlord that as long as the premiums are paid he will not enforce the covenant.)

He may have precluded himself from it if his conduct has prevented the defendant from doing what she otherwise would have done.

(LORD DENMAN, Ch. J.: It had not led her to alter her situation.)

Secondly, Oliver's conduct was an entire waiver of the covenant so

(1) Rv. & M. 343.

- (3) 45 R. R. 538 (6 Ad. & El. 469).
- (2) 62 R. R. 763 (9 Car. & P. 706).
- (4) 28 R. R. 426 (4 B. & C. 606).

far as it required insurance in the joint names. The covenant was to "insure and continue insured" in the joint names &c., not to "insure, and keep insured" as in Doe d. Flower v. Peck (1), where, it may be observed, no insurance appears to have been effected at all. Here, one policy was to be executed and approved of, and then nothing \*was to be done for the future but to continue the insurance by regularly paying the premiums. The policy in a single name was approved of by Oliver; and the insurance was duly kept alive. \* \* One policy was contemplated; and, if it was effected irregularly, the acquiescence of Oliver was a waiver. It could not be intended that a new policy should be effected as soon as the premises were assigned. At all events that could not be required unless a notice had been given to the tenant to alter the insurance.

Doe d. Muston e. Gladwin.

r \*960 1

Cur. adv. vult.

### PATTESON, J. now delivered the judgment of the Court:

This was an action of ejectment on a forfeiture for breach of a covenant to insure in the joint names of landlord and tenant. The right to recover was clear, unless the lessor of plaintiff had by his conduct barred himself from proceeding.

[ \*961 ]

The reversion in the property had often changed \*owners. In 1837 it was conveyed to Oliver, and on 13th January, 1848, by him to the lessor of the plaintiff. A policy was effected by the defendant on the 28th January, 1836, in the sole name of the defendant, which was kept alive by payment of the annual premium. At Christmas, 1842, the regular premium was paid for the ensuing year. There was no insurance in the joint names. The demise was laid in May, 1843. The defendant's son-in-law proved at the trial that, on the very day when Oliver parted with this property to the lessor of the plaintiff, he had paid Oliver the rent up to Christmas: he also proved that the policy effected had been previously shown to Oliver, who expressed himself perfectly satisfied with it.

Under these circumstances this ejectment must be considered as unusually harsh; and it is impossible for any Court to lend itself willingly to enforce the proceeding. The expression that the law abhors a forfeiture was never more appropriate. But we must not forget that the legal rights of parties are all that we have power to deal with. Even the Court of Chancery has refused to enjoin

DOE d. MUSTON C. GLADWIN. against proceeding at law for breach of the covenant to insure: Green v. Bridges (1); and on occasions like the present Lord Tenterden was in the habit of saying that we are bound to give all instruments their natural construction, and attach to them their legal consequences, whatever our inclinations may be (2). This course may operate severely in particular cases; but its general effect is no doubt beneficial, by teaching all that they must fulfil their engagements, and by giving certainty to their mutual relations.

[ 962 ]

Since this lease, then, contains a proviso for re-entry in case of a breach of this covenant as well as that of others which may be thought more important, we have only to enquire whether it has been broken so that the landlord might maintain an action of covenant for the breach. That it has been broken is unquestionable: but the present landlord is said to be bound by the act of the former, who gave the defendant to understand that he should not require the performance of the covenant, but was satisfied with the substitution of a different mode of insuring. The case was likened to Pickard v. Sears (3) and to some others, where it was held that a party may by his conduct so mislead another, and so affect his interests, as to deprive himself of the right to complain of what was afterwards done under an impression which he himself had produced; and a recent case of Doe d. Pittman v. Sutton (4) was particularly brought forward. It seems, however, sufficient to observe that no case has gone to the length of intimating that a breach of covenant can be justified by a parol licence to break it. This would be to confound well established legal principles. last-named case of Doe d. Pittman v. Sutton (4), which is cited as nearest to the present, is very plainly distinguishable when examined. There the covenant to insure on the tenant's part was qualified by an option given to the landlord to insure if the tenant made default, and to add the amount of premiums to his rent; and the evidence showed that the landlord had represented to the tenant that he had availed himself of this power by insuring. representation would naturally induce \*a belief that the insurance was actually effected according to the terms of the lease, in the manner which the landlord proposed. Against an action of covenant, the tenant might have defended himself by showing that the

[ \*963 ]

<sup>(1) 4</sup> Sim. 96.

<sup>(3) 45</sup> R. R. 538 (6 Ad. & El. 469).

<sup>(2)</sup> See Doe d. Davis v. Elsam, 31 R. R. 729 (Moo. & Mal. 189).

<sup>(4) 62</sup> R. R. 763 (9 Car. & P. 706).

landlord prevented him from insuring, by representing that he had himself insured, and that, in fact, that peculiar covenant was not broken if the landlord's statement was true. The case of Doe d. Knight v. Rowe (1), before Lord Tenterden, was also much pressed on us in argument; but there the landlord had misled the tenant, by delivering to him a deficient abstract of the lease. But in this case there is nothing but verbal evidence that a landlord had said that he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured according to the covenant; for the waiver by acceptance of rent could not operate beyond Christmas, up to which period that rent was accepted; and, this being a continuing covenant, a subsequent breach entitled the lessor of the plaintiff to re-enter: Doe d. Flower v. Peck (2).

Muston t. Gladwin.

DOE d.

We think, therefore, that the rule must be discharged.

Rule discharged.

## HOPKINSON v. JOHN JACKSON LEE.

(6 Q. B. 964-975; S. C. 14 L. J. Q. B. 101; 9 Jur. 616.)

1845. Feb. 5, 12.

[ 964 ]

Covenant, by one plaintiff, on a deed executed between plaintiff and H. of the one part, and defendant of the other part. The deed recited that defendant had applied to plaintiff to lend E., on mortgage, 2,900l. moneys of H., then in plaintiff's hands as trustee for H.: that plaintiff had declined, not being satisfied with the security for payment of interest, whereupon defendant offered the after mentioned covenant as further security, and plaintiff and H., being satisfied therewith, agreed to accept the same, and advance the 2,900%; That accordingly, by indenture of mortgage and assignment, to which E., the borrower, was party of one part, and plaintiff and H. respectively of other parts, in consideration of 2,9001. paid by plaintiff to E. out of such moneys of H. as aforesaid, a policy of assurance and the dividends on certain Bank Annuities were assigned to plaintiff, but subject to redemption &c., with covenants by E. to pay principal and interest and the premiums on the policy, and a proviso that, in default of payment of any such premium, plaintiff might pay the same, and repay himself the amount out of the Bank Annuities. After these recitals, defendant, by the first mentioned deed, in pursuance of the agreement, and in consideration of the premises, and of plaintiff having advanced the 2,900% to E., covenanted &c., with and to plaintiff, his executors, &c., and also as a distinct covenant with and to H., her executors, &c., that defendant, subject to the proviso after mentioned, would pay 5 per cent. interest on the 2,900l. until payment of the principal. Provided, and it was declared and agreed between and by the parties thereto, that the covenant was intended only as a security for so much of the interest as the dividends of the Bank Annuities &c., after payment of the premiums, should be insufficient to pay: and that, as between

Hopkinson v. Lee. defendant and the plaintiff and H., their executors, &c., such part of the dividends as should from time to time remain after payment of the premiums should first be applied in payment of the accruing interest, or so much as the dividends should be sufficient to pay, and that defendant, his heirs, executors, &c., should be liable on the covenant for so much only of the interest as the residue of the dividends should from time to time be insufficient to pay.

Held, that H. ought to have been joined as a plaintiff by reason of her joint interest, disclosed by the deed, in the subject-matter of the covenant.

COVENANT. The declaration stated that on 1st August, 1840, by articles of agreement then made &c. between Thomas Mann Lee and defendant of the one part, and plaintiff and Ann Caroline Hogg of the other part (profert): After reciting that T. M. Lee and defendant, as the solicitors or agents of Emily de Coetlogon, Henry Hewgill and Frances Emily his wife, had lately on their behalf requested plaintiff to lend to them 2,900l. out of certain moneys of the said A. C. Hogg, then in his hands and held by him in trust for her, upon the security of an assignment by way of mortgage of such policy of insurance, Bank Annuities, &c., as were thereinafter mentioned; And that plaintiff, though otherwise willing to make such \*loan on the security of such proposed mortgage, yet, not being satisfied that the same was a sufficient security for the interest to grow due on such sum of 2,900l., had declined to lend the same without some further security for payment of the interest, and thereupon T. M. Lee and defendant had proposed to enter into such covenant for further securing the same as thereinafter contained; And "that the said plaintiff and the said A. C. Hogg, being satisfied with such further security, agreed to accept the same, and to advance the said sum of 2,900l." to E. de C., &c.: And accordingly, by indenture of mortgage and assignment bearing even date with the said articles, and made between Viscount Walpole and others (named) of the first part, the said E. deC. of the second part, Hewgill and his wife of the third part, plaintiff of the fourth part, and A. C. Hogg of the fifth part, in consideration of 2,900l. to the said E. de C., H. Hewgill and F. E. his wife, paid by plaintiff out of such monies of the said A. C. Hogg as aforesaid, in the manner &c. therein particularly mentioned, a certain policy of assurance &c. on the life of E. de C., the dividends to accrue during her life on certain Consolidated Bank Annuities, her estate for life in certain Long Annuities, and the estate or interest of Hewgill and his wife in a moiety of such Bank and Long Annuities after the death of E. de C., were, in manner therein mentioned, assigned and conveyed to plaintiff, his executors, administrators and assigns, but

[ \*965 ]

subject to redemption on payment by E. de C., Hewgill and his HOPKINSON wife, their executors, &c., to plaintiff, his executors, &c., of 2.900l. with interest at 5 per cent., at the time therein mentioned; and that in the said indenture were contained the usual covenants, on the part of the said \*E. de C., &c., for repayment of the principal and interest after the rate aforesaid by equal half-yearly payments. &c., and for payment of the annual premiums on the policy, and a provision authorizing plaintiff, his executors, &c., in case of default in payment of any of such premiums, to pay the same and repay himself the amount out of the said Bank Annuities &c.: He, the defendant, by those articles of agreement, in pursuance of the said recited agreement in that behalf, and in consideration of the premises and of plaintiff having advanced and lent the sum of 2,900l. to the said E. de C., H. H. and F. E. his wife, at the request of the said T. M. Lee and the defendant as aforesaid, "did covenant, promise and agree with and to the said plaintiff, his executors, administrators and assigns," that they, the said T. M. Lee and the defendant, but subject and without prejudice to the proviso or qualification thereinafter in that behalf contained and in the declaration after mentioned, should and would in the meantime and until full payment of the said 2,900l., pay or cause to be paid unto plaintiff, his executors, &c., interest on the said 2,900l., or on such part or parts thereof as should from time to time remain unpaid after the rate of 5l. per cent. per annum, by equal half-yearly payments on 1st February and 1st August, and should and would make such payments without any deduction, &c.: Provided nevertheless, and it was thereby agreed and declared between and by the parties thereto, that the covenant and agreement thereinbefore contained was intended only as security for such part or parts of the interest on the said 2,900l. as the dividends or other annual proceeds or produce of the Bank Annuities and other premises assigned as aforesaid, after first paying or \*deducting thereout the premiums from time to time to become due and payable on the aforesaid policy of insurance, should from time to time be insufficient to pay or satisfy; and that, as between T. M. Lee and the defendant, their heirs, executors, &c., and the said plaintiff and A. C. Hogg, their executors, administrators and assigns, such part or parts of the aforesaid dividends, &c., as should from time to time remain after full payment and satisfaction of the premiums to become due or payable on the said policy of insurance, or any renewed or other policy of insurance to be

r. Lee.

[ \*966 ]

[ \*967 ]

R.R.

HOPKINSON C. LEE.

[ \*968 ]

effected in lieu thereof under the power in the said recited indenture in that behalf contained, should in the first instance be applied in payment and satisfaction of the interest from time to time to accrue due on the said 2,900l. or any part thereof which from time to time might remain due and unpaid, or such part or parts of such interest as the same should be sufficient to pay; and that T. M. Lee and the defendant, their heirs, executors, &c., should be liable or chargeable on their aforesaid covenant for or in respect only of such part or parts of the aforesaid interest as such residue of the aforesaid dividends, &c., should from time to time be insufficient to pay.

Averment that, although the principal sum of 2,900l. remained unpaid, yet T. M. Lee and defendant did not, nor did either of them, pay or cause to be paid to plaintiff such part of the interest on the said 2,900l. as the dividends &c. of the Bank Annuities and other assigned premises, after making the payments and deductions &c., were from time to time insufficient to pay, by equal half-yearly payments &c., but they neglected &c.: \*and that, on &c., 145l. for one year's interest &c. became and was due and payable to plaintiff under and by virtue of the said indenture; and that the dividends &c., after deducting the premiums which became due &c. (and which plaintiff paid and retained thereout, default in payment having been made by E. de C., Hewgill and his wife), were, before and on the day and year last aforesaid, and thence have been, and are, insufficient to pay or satisfy the said sum so due for interest, by a large sum, to wit &c., which became and was on &c. due and payable from defendant and T. M. Lee to plaintiff under the said articles of agreement, and still is wholly due &c. to plaintiff, contrary to the covenant &c. And so the plaintiff saith &c.

Plea, Non est factum. Issue thereon.

On the trial, before Lord Denman, Ch. J., at the Kingston Spring Assizes, 1844, it appeared that the material clause in the articles of agreement was in the following words:

"Now these presents witness that, in pursuance of the said recited agreement in this behalf, and in consideration of the premises, and of the said Jonathan Hopkinson" (the plaintiff) "having so advanced and lent such sum of 2,900l. to the said E. de C., H. H. and F. E. his wife at the request of the said T. M. Lee and J. J. Lee as aforesaid, it is hereby agreed and declared between and by the parties hereto, and they the said T. M. Lee and J. J. Lee do hereby severally and respectively, and

for their several and respective heirs, executors and administrators, covenant, promise and agree with and to the said Jonathan Hopkinson, his executors, administrators and assigns, and also as a distinct covenant with and to the said A. C. Hogg, her executors, \*administrators and assigns, in manner following, that is to say." Then followed the covenant set out in the declaration.

Hopkinson t. Lee.

[ \*969 ]

The defendant's counsel contended that the plaintiff must be nonsuited on the ground of variance; or because the action was brought against J. J. Lee only, whereas it appeared by the deed that A. C. Hogg was jointly interested in the subject-matter. The Lord Chief Justice gave leave to move to enter a nonsuit: and the plaintiff had a verdict.

Thesiger, in Easter Term, 1844, moved for a rule to show cause why a nonsuit should not be entered; and he relied upon Anderson v. Martindale (1), as not distinguishable from the present case. He also moved to enter a verdict for the defendant on a ground which it is not material to state. A rule nisi was granted on both points.

In this vacation (2),

Martin and J. Arnould showed cause, and contended that no joint covenant appeared; that, in declaring on a contract under seal, if the terms of the instrument are unambiguous, they alone must guide, and no question can arise, as in cases of simple contract, as to the party from whom the consideration moved; and that, in the present case, the agreement itself declared the covenant with A. C. Hogg to be a distinct one from the covenant with the plaintiff. They cited note (1) to Eccleston v. Clipsham (3); note (c) to the same case (4) in the 5th \*edition of Serjt. Williams's Saunders; and the addition to that note in ed. 6 (5); and they relied upon Sorsbie v. Park (6), and Mr. Preston's addition to Shepp. Touchst. 166 (7), cited in the note on Saunders last referred to.

[ \*970 ]

Knowles and Wordsworth supported the rule, and cited Withers v. Bircham (8), Southcote v. Hoare (9) and Scott v. Godwin (10).

- (1) 6 R. R. 334 (1 East, 497).
- (2) February 5th. Before Lord Denman, Ch. J., Patteson and Coleridge, JJ.
  - (3) 1 Wms. Saund. 155.
  - (4) 1 Wins. Saund. 165, 5th ed.
- (5) 1 Wms. Saund. 155 a, 6th ed.
- (6) 12 M. & W. 146.
- (7) 7th ed.
- (8) 27 R. R. 350 (3 B. & C. 254).
- (9) 12 R. R. 700 (3 Taunt. 87).
- (10) 27 R. R. 386 (1 Bos. & P. 67).

Hopkinson t. Lee, The rest of the authorities referred to, and arguments used, for and against the rule, will appear sufficiently by the judgment of the Court, which was delivered in this vacation (February 12th) by

#### LORD DENMAN, Ch. J.:

The question is whether a nonsuit ought to be entered on account of the action being brought by the plaintiff only, when the covenant is, in contemplation of law, made by the defendant with the plaintiff and Ann Caroline Hogg jointly. That it is so made is argued from the authority of a very long series of cases, of which Slingsby's case (1) is the leading one, though by no means the oldest; a case the more entitled to respect, because it is founded on a principle the reason of which is adopted and sanctioned in Anderson v. Martindale (2) by Lord Kenyon, whose comment upon it, and whose consequent decision, received the silent acquiescence of the whole Court. This case does not appear to have been over-ruled or questioned. It was acted upon in the Court of Error over which Gibbs, Ch. J. presided in 1818: James v. Emery (3). \*The same rule is laid down by Sheppard, in the Touchstone, 166.

[ \*971 ]

But the last very learned editor, Mr. Preston, has there originated a doubt whether it is not expressed too generally. He refers to several cases, none of which impugn or qualify the rule, and (which is truly remarkable) does not even name Anderson v. Martindale (2). Mr. Preston introduces an exception not grounded on any judicial authority, viz. that the covenant must be ambiguous before that which is, primâ facie, either joint or several can be properly construed as several or joint according to the interest of the covenantees. He cites Salk. 393 (4) (which gives no countenance to the exception), and 2 Roll. Ab. 419, which relates to a wholly different matter. (We have looked into 1 Roll. Abr. 419, which is under the head Condition, and 519, under that of Covenant; in neither place does this doctrine appear (5).) Mr. Preston thus concludes his observa-"The general rule proposed by Sir VICARY GIBBS, and to be found in several books, would establish, that there was a rule of law too powerful to be controuled by any intention, however express." But we think there is no ground for Mr. Preston's apprehension · that words perfectly plain and unambiguous, confining the contract expressly to one person and excluding all others from its operation,

<sup>(1) 5</sup> Co. Rep. 18 b.

<sup>(2) 6</sup> R. R. 334 (1 East, 497).

<sup>(3) 19</sup> R. R. 503 (5 Price, 529; S. C. 8 Taunt. 245).

<sup>(4)</sup> Robinson v. Walker, 1 Salk. 393.

<sup>(5)</sup> Probably the reference intended by Mr. Preston is to 2 Roll. Ab. 149 Obligation (H).

will be strained by the law so as to comprehend those whom it took HOPKINSON pains to exclude. The true explanation of the rule is rather this: that the whole covenant taken together binds to both covenantees and not to either of them alone, though separately named in some of its \*words, by reason of the joint interest in the subject-matter of the action appearing on the face of the deed itself.

T.RK.

F \*972 7

Such being the state of the authorities, a special case (1) was reserved from the Assizes for the Court of Exchequer, where certain persons with whom a covenant had been made sued the covenantors The deed, being fully set out, was found to make a covenant with the plaintiffs for themselves and others; and in Michaelmas Term, 1843, the Court held, in strict conformity with all the cases, that a nonsuit ought to be entered, because those others had not been joined as plaintiffs in bringing the action though the covenant declared on was in its terms made with them alone. But the plaintiff here places his whole reliance on some dicta which fell from the late CHIEF BARON and from PARKE, B., applicable, not to that case, but only to the converse of it, which were represented as at variance with the old law. Unluckily, no reference was made to Anderson v. Martindale (2), as the Court, justly thinking the general rule too clear for argument, stopped the learned counsel who supported it. Lord Abinder thought the rule plain and certain, and that it required no authority: "it is correctly stated by Mr. Preston:" he then cites the rule with the exception (3). PARKE, B. also thinks the correct rule is laid down by GIBBS, Ch. J. in James v. Emery (4), with the qualification stated by Mr. Preston. These learned Judges could not intend to overrule Anderson v. Martindale (2), which was not \*brought before them; nor, if they did, could we agree to be bound by their extra-judicially declaring such an intention where their decision itself pursued the doctrine of that case.

[ \*973 ]

The instrument proved in this case recited that the defendant had borrowed of the plaintiff 2,900l., part of the moneys of Ann C. Hogg, then in his hands in trust for her, on the security of a mortgage of a policy of insurance and certain Bank Annuities and other valuable things, and that the plaintiff had required some further security, and thereupon the defendant proposed to enter

- (1) Sorsbie v. Park, 12 M. & W. 146.
- (2) 6 R. R. 334 (1 East, 497).
- (3) PATTESON, J. observed, during the argument of the present case, that the words "by several persons," in
- the judgment of Lord ABINGER, 12 M & W. 157, line 8, should be read
- "to several persons."
  - (4) 19 R. R. 503 (5 Price, 533).

Hopkinson c. Leg.

[ \*974 ]

into this covenant for further securing the same, and that the plaintiff and A. C. Hogg were satisfied therewith, and agreed to accept the same, and to advance the said sum of 2.900l., and thereupon the mortgage had been executed in consideration of the same advance of 2,900l.; and it was witnessed that, in pursuance of the said agreement, and in consideration of the premises and of the advance of the said sum to defendant, the defendant covenanted with the plaintiff, his executors, administrators and assigns, "and also as a distinct covenant with and to the said A. C. Hogg, her executors, administrators and assigns, in manner following," that is, to pay the plaintiff, his executors, administrators or assigns, regular interest on the 2,900l. or such part thereof as should remain unpaid: Provided that this covenant should be only a security for such part of the said interest as the dividends or other annual income or produce of the Bank Annuities and other premises assigned (after first paying the premiums on the policy) shall from time to time be insufficient to pay or satisfy; and that, as between the two Lees, their heirs, executors, administrators and assigns, and the plaintiff and A. C. \*Hogg, their executors, administrators and assigns, such part of the aforesaid dividends or income or annual produce as shall from time to time remain after full payment and satisfaction of the premiums of insurance shall, in the first instance, be applied in payment of the interest on The covenant is made with the plaintiff in relation to the 2.900l. the security of 2,900l., the sole property of A. C. Hogg; and it binds the borrowers to pay, as between themselves on the one hand and the plaintiff and A. C. Hogg on the other, the deficiency between the income of Bank stock and the premiums of the insurance.

The money lent in the case of Anderson v. Martindale (1) was the consideration of the covenant to pay an annuity during the life of Elizabeth Wyatt; but the covenant itself was with the plaintiff's intestate, his executors, administrators and assigns, and also to and with the said E. Wyatt and her assigns, to pay the plaintiff the annuity. This language as entirely confines the covenant to the plaintiff, and makes another separate covenant with E. Wyatt, as any words not directly exclusive can make it. In Slingsby's case (2) the covenant was with certain persons named, and "ad et cum quolibet et qualibet eorum." No words can be stronger to give the plaintiff an option to sue all jointly or each separately. Yet in

<sup>(1) 6</sup> R. R. 334 (1 East, 497).

<sup>(2) 5</sup> Co. Rep. 18 b.

both the Court held that, by reason of the joint interest in the HOPKINSON subject-matter of the suit, as disclosed in the deed itself, the action must be joint.

LER.

We think it would be a waste of time to argue that the words "as a distinct covenant" do not furnish any stronger inference of the intention to exclude than those just cited from those wellknown cases. If they \*are still law, the present case must be decided against the plaintiff. We see no ground whatever for doubting whether they are.

[ \*975 ]

We must not conclude without observing that the case of Foley v. Addenbrooke (1), decided in this Court in Hilary Term, 1843, but not alluded to in Sorsbie v. Park (2), probably because not then reported, is in exact conformity with the decision in that case and in this, and contains no doctrine at variance with Anderson v. Martindale (3) and the older authorities.

Rule absolute to enter a nonsuit.

# REG. v. THE YORK AND NORTH MIDLAND RAILWAY COMPANY.

1845. May 3. June 3.

(14 L. J. Q. B. 277-282.)

[ 277 ]

Mandamus-Railway Act, construction of-Remedy against Company under covenant.

Under a Railway Act, 6 & 7 Will. IV. c. lxxxi. the Company were required "to make proper watering-places for cattle, in all cases where by means of the railway the cattle of any persons occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same with water."

After this Act passed, and during the progress through Parliament of a subsequent Act, for amending the first Act, by an indenture made between the Railway Company of the first part, and Sir W. M. of the second part, in consideration, amongst other things, of Sir W. M.'s withdrawing all opposition to the latter bill, the Company covenanted "that they would pay to Sir W. M., as and for the special damage to be thereby occasioned to his estate, and particularly to his mansion house, the sum of 5,000l., and that whenever any close, &c. of Sir W. M. should be intersected by the said railway, the different parts adjoining should be thrown together and properly levelled, &c., and that the Company should, at their own expense, make and complete such good and sufficient fences, drains, gates, stiles, and other conveniences, as might be necessary for the re-dividing of the fields which might be intersected by the railway, and for laying them to the adjoining fields of the same estate for the purpose of convenient occupation, or otherwise would pay the said Sir W. M. the costs incurred by him in so

<sup>(1) 62</sup> R. R. 326 (4 Q. B. 197).

<sup>(3) 6</sup> R. R. 334 (1 East, 497).

<sup>(2) 12</sup> M. & W. 147.

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doing." The 5,000% was paid by the Company, and, under the indenture. Sir W. M. had given notice to the Company to make certain fences, drains, crossings, gates and ponds: Held, that the covenant and the proceedings under it were no answer to a mandamus to the Company to make watering-places, under the Act of 6 & 7 Will. IV. c. lxxxi.

MANDAMUS to the York and North Midland Railway Company.

The writ suggested that by an Act of 6 & 7 Will. IV. (1), entitled, &c., it was enacted that certain persons therein described, and their several respective successors, should and might be united into a Company for making and maintaining a railway, &c., and should be a body corporate, by the name and style of "The York and North Midland Railway Company;" and that it was enacted by the said Act (2), "that the said Company should from time to time, at their own expense, make such arches, tunnels, culverts, drains, or other passages over, under, or by the side of the said railway, and the fences on the sides thereof respectively, of such breadth, depth and dimensions as should be sufficient at all times to convey the water as clearly from the lands adjoining or lying near to the said railway as before making the said railway, without obstructing or impounding the same in any way to the prejudice of any of the said lands, and also to make proper watering-places for cattle, in all cases where, by means of the said railway, the cattle of any person occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same at all times with water from such rivers, brooks, streams, or springs of water, as \*would have supplied the cattle of such persons if the said railway had not been made, or from any other source or feeder which could lawfully be obtained for that purpose;" and also that another Act passed in 1 Vict. (3), to alter and amend the former Act; and that the Company, under the powers of the said several Acts, had made and carried the railway through and intersected certain closes of land, the property of Sir W. M. Milner, Bart., in the several occupations of A., B., &c., numbered, &c. (being eight in the whole), and in which said several closes of land there were ancient ponds or watering-places for cattle, and that by means of the said railway having so intersected the said closes, the said ancient ponds or watering-places for cattle had been severally cut off from one portion of the said closes respectively, and the cattle of the said A., B., C., &c., respectively occupying such portions of

[ \*278 ]

<sup>(1) 6 &</sup>amp; 7 Will. IV. c. lxxxi. The Act received the Royal assent 21st of June, 1836.

<sup>(2)</sup> Sect. 88.

<sup>(3) 7</sup> Will. IV. & 1 Vict. c. lxviii. Royal assent 30th of June, 1837.

the said closes as aforesaid, had been thereby deprived of access to their ancient watering-places; and that in pursuance of the provisions of the said Acts of Parliament, the Company ought at their own costs and charges to make proper watering-places, in such portions of the said closes of land respectively as had by means of the said railway been cut off and intersected from the several ancient ponds or watering-places for cattle therein, and in which the cattle of the said A., B., and C., respectively occupying the same, as aforesaid, had been deprived of access to such ancient watering-places as aforesaid, and to supply the same at all times with water when made; and that application by a notice in writing, under the hands of Sir W. M. Milner, A., B., and C., dated the 25th of March, 1843, had been made to the Company, in pursuance of the provisions of the said Acts, to make such watering-places as aforesaid, that is to say, &c. (specifying them), but that the Company had wholly neglected and refused, &c. The writ then commanded the Company, at their own proper costs and charges, to make or cause to be made proper watering-places for cattle, in such portions respectively of the said several closes of land as last aforesaid, and to supply the same at all times with water when made, pursuant to the aforesaid application made to them in that behalf, and to the provisions of the said Acts of Parliament.

Return, that the within-mentioned closes of land, at the time of making the indenture hereinafter mentioned, were and still are the property of Sir W. M. Milner, parcel of other lands of which he, the said Sir W. M. Milner, was then seised or otherwise entitled to; and that after the passing of the Act of Parliament first within mentioned, and during the passing through Parliament of the bill for the Act secondly within mentioned, and before the making and carrying the within-mentioned railway through the said closes of land as within mentioned, to wit, on the 1st of May, 1837, by a certain indenture then made between the said Company, of the one part, and the said Sir W. M. Milner, of the other part, and sealed, &c., it was covenanted, &c., that in case the said Company should make and carry their railway through the said lands and tenements of the said Sir W. M. Milner, in the altered line, as proposed by the said bill for the second within-mentioned Act, and then intended to be authorized by the said last-mentioned Act, they, the said Company, should pay to the said Sir W. M. Milner, as and for the special damage to be thereby occasioned to the said lands and tenements of the said Sir W. M. Milner, of which the within-

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mentioned closes then and still are severally part and parcel, and particularly to a mansion house of his, called Bolton Lodge, the sum of 5,000l., the same to be paid by the said Company, in manner therein mentioned, to be exclusive of the value of the land which the said Company would require for the purposes of the said railway, and the ordinary damages, which the said Company might commit, either to the said Sir W. M. Milner or his tenants, which land and damages were to be valued and paid for by the said first-mentioned Act, unless the said parties to the deed should otherwise agree. And it was in and by the said deed of covenant further covenanted and agreed by and between the said Company and the said Sir W. M. Milner, that whenever any close or parcel of land or ground belonging to him should be intersected by the said railway, the part or parts of such close, piece or parcel of land on each side of the said railway, or \*either of them, as the case might be, should, if the adjoining land belonged to the said Sir W. M. Milner, and if he should require the same, be thrown into the adjoining lands, by removing the fences and properly levelling the sites, and soiling the same in a sufficient and workmanlike manner; and that the said Company should and would, at their own expense, make and complete such good and sufficient fences, drains, gates, stiles, and other conveniences, as might be necessary for the re-dividing of the fields in the same estates which should be intersected by the said railway, and for laying them to the adjoining fields of the same estates, for the purpose of convenient occupation; or, otherwise, would pay on demand to the said Sir W. M. Milner, the reasonable costs and expenses he might be put to in making and executing such fences and other works as aforesaid, to be recovered in default of payment by action of debt, or on the case, in any of her Majesty's Courts of Record at Westminster -(other provisions of the deed were also set out, which are not material); and that on the 8th of July, A.D. 1837, the Company paid Sir W. M. Milner the 5,000l., in full satisfaction and discharge of the special damage, &c. And that after the passing of the Act secondly mentioned, and before the application of the 25th of March, 1843, viz., in April, 1840, the said Sir W. M. Milner caused to be served on the said Company a notice, together with a plan, and an explanation of the said plan respectively—(the notice was set out in the return, and called on the Company, in pursuance of the deed of covenant of the 1st of May, 1837, to make various fences, drains, crossings, gates and ponds, specified in the plan and

explanation); and that the Company did, in compliance with the said notice so served upon them in the month of April, 1840, and long before the making of the said application to them by the notice in writing of the 25th of March, 1843, make, complete and execute the said fences, drains and other works connected therewith, as specified in the said explanation under the head of fences and drains, and also the said crossings on the railway in the said explanation specified under the head of crossings on the railway, and also the said gates in the said explanation specified under the head of gates, except one; and that the said ponds in the said explanation specified under the head of ponds, were and are the same identical ponds as were specified and required to be made in and by the notice, bearing date the 25th of March, A.D. 1843, and that the cutting off the said ponds and watering-places as within mentioned, and the damage thereby occasioned to the said Sir W. M. Milner and his said estate, as within mentioned, were and are part and parcel of the damages which were in and by the said indenture covenanted and agreed to be conpensated, valued and paid for, as herein in that behalf above mentioned; and that the said ponds so required to be made by the said Company as aforesaid were and are conveniences which the said Company, in and by the said indenture, covenanted to make and complete, at their own expense, as above in that behalf mentioned.

To this return there was a traverse, setting out at length the indenture of the 1st of May, 1837. (By this indenture it appeared that the 5,000l. was paid, and the covenant before set out was entered into by the Company with Sir W. M. Milner, in order to carry out an agreement made by him with the Company, that he would withdraw his opposition to the second bill, which carried the line of railway nearer his mansion, and was in other respects more injurious to his property than the first, on receiving a full and adequate compensation for the special damage which should be occasioned to his property by reason thereof.) And the traverse of the return concluded with the following special traverse:

"Without this, that the cutting off of the said ponds and watering-places, as in the said writ mentioned, and the damage thereby occasioned, as in the said writ mentioned, were or are part and parcel of the damages which were in and by the said indenture covenanted and agreed to be compensated, valued and paid for, as in the return in that behalf mentioned, in manner and form as in the said return is in that behalf alleged, and this the

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said Sir W. M. Milner, A., B., C., &c., pray may be inquired of by the country. And the said Sir W. M. Milner, A., B., C., &c., by force of the said statutes in that behalf made and provided, as to so much of the said return as states and alleges that the ponds required to be \*made by the said Company were and are conveniences which the Company in and by the said indenture covenanted to make and complete, at their own expense, say that the said ponds so required to be made by the said Company, as in the said writ and return mentioned, were not nor are, nor were, nor are any of them, conveniences which the said Company in and by the said indenture covenanted to make and complete at their own expense, in manner and form as is in the said return alleged; and this the said Sir W. M. Milner, A., B., and C., &c., pray may be inquired of by the country."

Demurrer and joinder.

Wortley (Addison was with him), in support of the demurrer:

The defendants (the Company) object to the traverse, first, because it attempts to put in issue matter of law; secondly, because it is argumentative; thirdly, because it is too narrow; and, fourthly, that it traverses parts of the return, without traversing the whole. \* \* \*

Knowles (H. Hill was with him), contrà:

The return is altogether inconsistent. \* \* [It] ought to be quashed on the preliminary objection. But on the merits, this is not an injury which the Company, under the agreement, were bound to provide against. \* \*

Wortley, in reply. \* \* \*

Cur. adv. vult.

[281] The judgment of the Court was, on a subsequent day, delivered by

LORD DENMAN, Ch. J.:

This was a mandamus commanding the defendants, in pursuance of the Act of Parliament under which they are incorporated, to make ponds or watering-places in certain closes or pieces of land intersected by the railway, as prescribed by the 88th section of that Act. The defendants had made a return, stating an indenture

between Sir W. M. Milner, the prosecutor of this writ, and themselves, by which, in consideration of his not opposing the alteration of their line, it was agreed that they should pay to Sir W. M. Milner, as for the special damage thereby occasioned to the lands and tenements of the said Sir W. M. Milner, and particularly to a mansion house of his, called Bolton Lodge, the sum of 5,000l., to be paid as therein mentioned, and to be exclusive of the value of the land which the Company would require for the purposes of the said railway, and damages which the Company might commit either to the said Sir W. M. Milner or his tenants, and which land and damages were to be valued and paid for by the Company in the manner provided for by the Act, unless the parties to the deed should otherwise agree; and further, that whenever any closes or pieces or parcels of land or ground belonging to him should be intersected by the railway, and if the adjoining land belonged to Sir W. M. Milner, and he should require the same, those parts on each side of the railway should be thrown into the adjoining land. by removing the fences, drains, gates and stiles in a sufficient and workmanlike manner, and that the Company should and would. at their own expense, make and complete such fences, drains, gates and stiles, and other conveniences as might be necessary for the re-dividing of the fields on the same estate which should be intersected by the railway, and for laying them to the adjoining fields of the said estate for the purpose of convenient occupation. The defendants then state that Sir W. M. Milner gave notice that, in pursuance of the deed, he required them to make such fences, drains, gates, stiles, and other conveniences, as might be necessary; setting out as one head of the works he required to be done, the ponds which are the subject of this writ. The defendants say they executed the works required, except the ponds, and they conclude by alleging that the cutting off of ponds and wateringplaces, as stated in the writ, and damages occasioned thereby, were part of the special damages, covered by the 5,000l.; and, further, that the ponds they are required to make were not conveniences within the meaning of the indenture last set forth. W. M. Milner has traversed both these assertions, to which the defendants have demurred. Technical objections were taken on both sides. It was argued that the matters are matters of law and not of fact; on the other hand it was argued that the return is bad and is repugnant. We do not enter into these objections, as we are of opinion the indenture furnishes no sufficient answer to the writ

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The special damages, for which the 5,000l. were paid, are evidently such as were peculiar to Sir W. M. Milner in the alteration of the line of whatever nature they may be, and not such damages as might happen to any person whose lands were intersected; such damages are, in the very clause of the indenture, pointed out as ordinary damages, and the 88th section of the Act provides for them in terms. The indenture was made on the 1st of May, 1837, long after the Act, which passed on the 21st of June, 1836, and the clause in the indenture seems almost exactly to refer to that section among others in the Act. With respect to the other clause in the indenture, it is plain the word "conveniences," there used, does not apply to all things necessary for the occupation of the land, but to all things necessary for the re-dividing and laying the intersected closes to the adjoining land for the purpose of convenient occupation; it is the laying the lands together to which those words must be applied, not to making fences and other conveniences: added to which, the 88th section obliges the company to supply water, and gives them power to go even over the lands of a third person, which, if the clause of the indenture were to receive the construction of the defendants, would relate only to making ponds on the lands of Sir W. M. Milner. At all events, it cannot alter the obvious meaning \*of the indenture itself. Upon the whole, we are of opinion that the prosecutor is entitled to our judgment, and the peremptory writ of mandamus must issue.

[ \*282 ]

Rule absolute for a peremptory mandamus.

#### IN THE COURT OF COMMON PLEAS.

#### WHITHORN v. THOMAS.

(7 Man. & G. 1-10; S. C. 8 Scott, N. R. 783; 14 L. J. C. P. 38; 8 Jur. 1008.)

Nor. 18.

Borough of Tewkesbury.

[1]

[ \*2 ]

1844.

A., a freeman of the borough of T. resided with his wife and family, and carried on his business of wine-merchant at G., more than seven miles from T. He paid 9d. a week for the use of a bedroom and a dark closet in the house of a friend at T., A. keeping the key of the closet, in which he deposited wine-samples. He slept in the bedroom twelve times in the six months next before the 31st of July:

Held, that A. did not reside in T. for six months before the 31st of July, within the meaning of the Representation of the People Act, 1832 (2 Will. IV. c. 45), s. 27:1).

Semble, that a statement in the case—that A. had slept in T. "about twelve times," was uncertain and insufficient: but the Revising Barrister being present in Court, the Court permitted the case to be altered by him instanter.

Decisions of election committees of the House of Commons are not receivable as authorities, upon the argument of registration appeal cases.

THE claimant was a freeman of the borough of Tewkesbury, and entitled to have his name inserted in the list of freemen for that borough, if he resided \*within the borough, or within seven miles thereof, within the 2 Will. IV. c. 45; and whether he did so reside, is the question for the opinion of the Court.

The claimant is a wine-merchant, residing, and carrying on his business, at Gloucester (which is more than seven miles from the borough of Tewkesbury), where he has for many years occupied a house, in which he carries on his business, and also bonding vaults for the bulk of his stock. He is a married man, and keeps one domestic servant at his establishment at Gloucester. With the object of qualifying himself to vote for the borough of Tewkesbury, the claimant has, since the year 1844, paid to Mr. Sproule, a friend of his, and also agent for one of the sitting members for the said borough, the sum of 9d. a week for the use of a furnished bedroom in Mr. Sproule's house, situate within the said borough, and also of a closet about six feet by three, without a window, of which closet the claimant keeps the key, and in which, between January and July, 1844, he kept some wine-samples. During the same period he slept in the bedroom (about) twelve times, and during the year ending July, 1844 (about) fifteen to twenty times, on the occasion of his coming to Tewkesbury on business; but he has

(1) Followed in Barlow v. Smith Cases, 293, and Dipstale's case (1868) [1892] Fox and Smith's Registration L. R. 4 Q. B. 114, 19 L. T. 432.

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[ \*8 ]

never taken his meals at Mr. Sproule's except on some occasions when invited to dine as a friend. Mr. Sproule never let lodgings to any other person; and he made the above arrangement with the claimant for the purpose of assisting him to qualify as a voter for the borough. I decided that the claimant had not resided within the borough of Tewkesbury, within the meaning of the 2 Will. IV. c. 45, so as to entitle him to be placed upon the list of voters for that borough. If the Court are of a contrary opinion, then the name of Whithorn, and that of James Gorle, whose appeal depends upon a similar decision, and ought to be consolidated \*with the present, will be placed upon the register.

(Signed) H. S. K., Revising Barrister.

Tindal, Ch. J., when the case was called on for argument, intimated that the question, which appeared to be whether the residence of the claimant was bonâ fide or merely colourable, was rather one of fact than of law.

ERLE, J., observed that the case distinctly found that the claimant did not reside within the borough of Tewkesbury.

Byles, Serjt., for the appellant, submitted that the question was one of law, whether, upon the facts stated, the claimant resided in the borough.

MAULE, J. pointed out that the case was uncertain, in stating that the claimant slept in the bedroom "about twelve times;" and observed that it was impossible to say how many times was intended by that statement.

Byles, Serjt. proposed that the statement should be amended by striking out the word "about;" and that in the paragraph which stated that he slept there "about fifteen to twenty times," the word "between" should be inserted in lieu of "about." To which Cockburn, for the respondent, assented.

# TINDAL, Ch. J.;

We must adhere to the course we have previously adopted (1). We cannot allow alterations to be made in a case by consent.

- [4] Byles, Serjt. then suggested that as the Revising Barrister was in Court, the original case should be handed to him, and that he
  - (1) See Webb v. The Overseers of Aston, 58 R. B. 218 (5 Man. & G. 14).

should at once make the proposed alterations. This was accordingly done.

Whithorn v. Thomas.

Byles, Serjt.:

The case involves three points: first, whether the residence of the claimant is colourable; secondly, the nature, and thirdly, the degree, of such residence.

First, it is no objection that the claimant resided in the borough for the purpose of obtaining a vote: Rex v. Sargent (1).

(Upon the learned Serjeant also referring to Colonel Chaytor's case (2), The Milborne Port case (3), and other decisions of committees of the House of Commons collected in Elliott on Registration, pp. 198—204, 2nd ed., Tindal, Ch. J. said that, so far as the reasoning in these cases went, it might be proper to cite them, but not as authorities.)

All that is required is, that a party should have some connection with the borough.

(Tindal, Ch. J.: The mere object which the party had in view in residing in the place, will hardly be insisted upon as an objection, if there was a residence in fact (4).

# Cockburn assented.)

Secondly, as to the nature of the residence in this case. It would have been a sufficient inhabitation within the 13 & 14 Car. II. c. 12, s. 1, and the cases decided upon that statute. The result of the authorities is, that a party is said to reside where he lies or sleeps.

(MAULE, J.: That is, where he passes the night.)

In settlement cases the residence of an apprentice is, where he sleeps the last of the last forty nights of the apprenticeship: Rex v. Castleton (5), Rex v. Brighthelmstone (6).

(Maule, J.: A freeman to be entitled to vote is required \*to reside in the borough for six calendar months next before the 31st of July. Can you say that sleeping there for twelve days next before the 31st of July would be sufficient?)

It is submitted it would be if he had the right to sleep there during the rest of the six months, and that the animus revertendi.

- (1) 5 T. R. 466.
- (2) Harwich, 1 Peckw. 389.
- (3) Corb. & Dan. 227.

- (4) Vide post, p. 638.
- (5) Burr. Sett. Ca. 569.
- (6) 5 T R. 188.

[ \*5 ]

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[ \*6 ]

(Maule, J.: There is nothing in this case to show an animus revertendi on the part of the claimant. He might have had no occasion to go again to Tewkesbury.)

The claimant had entered into a contract with the landlord, and had actually hired the bedroom and closet, and he kept the key of the latter. There was no necessity for an actual occupation of the bedroom.

Thirdly, as to the degree of the residence. It may be said on the other side, that if the claimant had slept only one night at Tewkesbury, it clearly would not have been sufficient. That is putting an extreme case, which may be met by supposing the case of his having slept there every night but one. This is not a question as to the domicil of the party.

(TINDAL, Ch. J.: It may or may not be.

ERLE, J.: The word "residence" may have a very different meaning in different statutes.)

The learned Serjeant referred also to 2 Inst. 702.

Cockburn, for the respondent:

The real question is, whether the claimant, bonâ fide, had a place at which he slept in Tewkesbury. One important feature in this case is, that he is a married man, living in Gloucester, where his wife and family reside. Ubi uxor, ibi domus.

It appears that the claimant took the room for the purpose of regaining his vote. That may be not an objection per se; but such a taking should be supported by strong proof of a bonâ fide residence. It is important also to observe that the room was taken in the house of the agent for one of the sitting members. It was, at most, but "a passage residence;" \*as in Rex v. The Duke of Richmond (1), which is strongly in point.

(Maule, J.: The case does not state that the claimant took the room. It only says that he paid 9d. a week for the use of it.)

It is the same thing as if he had staid at an inn. In this view the present case is infinitely weaker than Rex v. The Duke of Richmond. It is altogether more a question of fact than of law. The claimant never did more than sleep at the house in question. In

(1) 6 T. R. 560.

Rex v. North Curry (1), BAYLEY, J. says that the word "reside," "where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep." A man undoubtedly may have more than one residence; but in this case the claimant has the mere colourable appearance of a residence.

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## Byles, Serjt., in reply:

If by colourable residence is meant that the room was taken for the purpose of obtaining or preserving a vote, that is admitted to be no objection. If more is meant, the Court will be governed by the same rule as the Court of Queen's Bench in special cases from Sessions; and will not infer fraud where none is stated (2). There was no final decision in Rex v. The Duke of Richmond. Lord KENYON, Ch. J. there says, "However, it is not necessary, at present, to say that this may not, on further investigation, turn out to be a bonû fide residence: the question here is, whether these facts ought not to be submitted to the consideration of a jury, and I am clearly of opinion that they ought." There is a great difference between residence and domicil. The latter is something \*more than the former, and may be quite different from it. In Story's Conflict of Laws, s. 41, it is said: "By the term 'domicil,' in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense, the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicil. In a strict and legal sense, that is properly the domicil of a person, where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning (animus revertendi)." And in s. 43, it is further said, "The French jurists have defined domicil to be, the place where a person has his principal establishment." And after referring to some other French authorities, he cites the definition of Vattel, "a fixed residence in any place, with an intention of always staying there (3). But," the learned author adds, "this is not an accurate statement. It would be more correct to say, that that place is properly the domicil of a person,

[ \*7 ]

<sup>(1) 4</sup>B. & C. 953; 7 Dowl. & Ry. 424. (2) Vide per BULLER, J. in Rex v. Fillongley, 1 T. R. 461; per Lord Kenyon, Ch. J. in Rex v. Fillongley,

<sup>2</sup> T. R. 711; and in Rex v. Llanbeder-goch, 7 T. R. 107.

<sup>(3) &</sup>quot;D'y demeurer toujours," Droit des Gens, § 218.

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THOMAS.

[ \*8 ]

in which his habitation is fixed, without any present intention of removing therefrom." Although Gloucester was the claimant's domicil, he may have had a residence at Tewkesbury.

TINDAL, Ch. J.:

The question in this case arises upon the thirty-second section of the 2 Will. IV. c. 45, which enacts that no person shall be qualified to vote for a borough, as a freeman, "unless he shall have resided for six calendar months previous to the last day of July" in the year in which the registration takes place within the borough. And the question is, whether, upon the case, as stated, there is enough to show that the Revising Barrister has come to a wrong decision.whether the facts distinctly show a residence by the claimant within the borough of Tewkesbury. I think they do not. I do not mean to say that where the object of a residence \*is to obtain a vote, that circumstance would detract from the right of the party; but the question here is, whether the claimant had a real, bona fide, residence in the borough. We must assume, that no other facts than those stated, came before the Revising Barrister, which, in his opinion, were material for the appellant. Then what are the facts, That the party had a residence and domicil at Gloucester, there can be no doubt; but all that appears as to the borough of Tewkesbury, is, that he paid to a friend of his, the sum of 9d. a week for the use of a furnished bedroom and a dark closet. of which closet the claimant kept the key; and that in this closet he had some wine-samples; that between January and July, 1844. he slept in the bedroom a dozen times, and during the whole year ending July, 1844, between fifteen and twenty times.

Now, first of all, it is to be observed that the mere payment of rent would not be equivalent to a residence. The residence required by the statute, must mean an actual occupation, for some part of the time specified, by the party himself, or an occupation by his family or servants. In this case we are not informed whether the twelve nights on which the claimant slept in Tewkesbury, are or are not, distributed over the six months—they may have been the very last, or the very first, nights of that period. It is impossible, upon this dry statement of facts, that the law should pronounce that they constituted a residence in Tewkesbury. The Revising Barrister was the judge of the facts; and it was for him to decide whether the claimant had a boná fide residence within the borough of Tewkesbury. I think that he has come to a proper

decision, and that it must be affirmed, and, in so very clear a case, with costs.

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#### COLTMAN, J.:

I am of the same opinion. It appears that the claimant had entered into a contract under \*which he might sleep at Mr. Sproule's house when he thought proper. The fact does not necessarily imply a residence. It is undoubtedly true that a party may In this case the claimant had a have two or more residences. separate domicil; and the question is, whether there was the animus residendi with respect to the lodging in Tewkesbury. is no objection that the lodging was taken for the purpose of obtaining a vote; but that circumstance induces one to doubt whether there was a taking animo residendi. It would not invalidate the right of voting if that animus existed; but it serves to cast a light upon the intention of the party. Upon the whole, I think the Revising Barrister was warranted in the conclusion at which he arrived.

#### MAULE, J.:

I think this is a very clear case, and one which probably, but for the importunity of the appellant, would not have been brought into this Court. Unless it appeared to me that the facts stated in the case clearly showed the Revising Barrister to be in the wrong, I should consider myself bound to support his decision. meaning of the term "inhabitant" has been considerably extended from what it originally imported; but this is not so with the term "resident." There cannot be the smallest doubt that the claimant in this case had not, in ordinary language, a residence in Tewkesbury. The question is, whether he had a residence in point of law. And I think it clear, he had not. (His Lordship recapitulated the facts of the case.) The facts stated by no means make out a residence. It is possible that a party may be a resident in a place where he has slept only the number of nights mentioned in this But there are other facts for our consideration. claimant has a wife and family at another place, where he ordinarily resides. I think the Revising Barrister was quite \*right in his conclusion, and that his decision must be affirmed, with costs.

[ \*10 ]

#### ERLE, J.:

It appears to me that the question here is, whether the Revising

[ \*9 ]

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Barrister was legally bound to find that the claimant was a resident in Tewkesbury, within the meaning of the thirty-second section of the Reform Act. I am not aware that the term "reside" is so used in any statute, as that the facts stated in this case, could be considered as amounting to a residence. I think that in the Reform Act, the intention of the Legislature was, that a party who obtained a vote by residing in a borough, should have some local interest there—referring to the ordinary meaning of the word "residence," as conveying the idea of home. It is stated that the claimant in this case paid 9d. a week for the use of a bedroom. It does not follow from that fact that he had the exclusive right to that room. It is also stated that he slept there twelve times during a period of six months. That is a very small number of times. The fact of sleeping at a place, indeed, by no means constitutes a residence—though, on the other hand, it may not be necessary for the purpose of constituting a residence in any place to sleep there at all. If a man's family are living in a borough, and he is absent for six months, but with the intention of returning, he will still be considered as residing there. But there is nothing of that kind in this case. And the other facts stated, such as the occupation of a closet by keeping wine-samples in it, certainly will not establish a residence.

Decision affirmed, with costs.

1844. *Nov*. 18.

Southern Division of Lancashire,

# JOHN GADSBY v. SAMUEL WARBURTON.

(7 Man. & G. 11-20; S. C. 8 Scott, N. R. 775; 14 L. J. C. P. 41.)

"Of Poplar Grove, Didsbury," is a sufficient description of the place of abode of an objector in a notice of objection, without stating where Didsbury is situated.

Semble, that the description of the place of abode of an objector, given in a notice of objection (under the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 7) will, in all cases, be sufficient, if it be the same as that inserted in the list of voters (1).

On appeals from decisions of Revising Barristers, the Court will hear only one counsel on each side.

THE respondent's name appeared on the list of persons entitled to vote in the election of any knight of the shire for the Southern Division of Lancashire, in respect of property situate in the township of Harpurtrey within the polling district of Manchester,

<sup>(1)</sup> See Thackway v. Pilcher (1866) L. R. 2 C. P. 100; 36 L. J. C. P. 73.

and the place of his abode was correctly stated to be "Newton, near Hyde, Cheshire."

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WARBURTON.

The appellant sent to the respondent, through the post, a notice of objection, as follows:

"To Mr. Samuel Warburton, of Newton, near Hyde, Cheshire.

"Take notice, that I object to your name being retained in the Harpurtrey list of voters for the Southern Division of Lancashire. Dated, this eighteenth day of August, one thousand eight hundred and forty-four. (Signed) John Gadsby, of Poplar Grove, Didsbury, on the register of voters for the township of Manchester."

The appellant's name appeared on the register of voters for the township of Manchester; and the place of his abode was stated in the register, to be (as stated in the notice of objection), "Poplar Grove, Didsbury."

The place of the appellant's abode was truly described \*in the notice of objection, to the extent to which it appeared in that notice, and as he had himself described it in the register of voters; but it was urged, on behalf of the respondent, that the description of the appellant's place of abode, as it appeared on the notice of objection, was not sufficient to sustain a notice of objection against a voter on the list, for the purpose of expunging his name, though it might be sufficient on the register to entitle the appellant to have his name retained on the list, so far as the description of his place of abode affected that right.

I held the notice insufficient in fact, and that something ought to have been added to the description of the appellant's place of abode, as "Lancashire" or "near Manchester" (Didsbury being a few miles only from Manchester and a township within the polling district of Manchester), or the like, as the case might be; and I retained the respondent's name on the list without calling upon him to prove his qualification.

It was then contended, on behalf of the appellant, that as he had described his place of abode in the notice of objection in the same words in which he had described it on the register of voters, it was sufficient, and that by law he was not bound to describe his place of abode in the notice of objection more fully, or otherwise, than he had previously described it upon the register of voters then in force.

I ruled the contrary.

The question for the opinion of the Court is, whether the appellant's statement in the notice of objection of his place of

[ \*12 ]

Gadø**by** e. Wabburton.

[ \*18 ]

abode, as he has stated it for the purpose of his own vote on the register, is, under the facts and circumstances hereinbefore mentioned, sufficient in law to sustain the said notice against the respondent.

If the Court are of opinion that the description given by the appellant in the notice of objection of his place \*of abode, is sufficient in law to sustain the notice against the respondent, I having decided and adjudged that description to be insufficient in fact, the name of the respondent is to be expunged from the register of voters; otherwise, to remain.

(Signed) R. M., Revising Barrister.

Cockburn (with whom was Kinglake, Serjt. (1)) for the appellant:

The questions in this case are, first, whether the description of the place of abode of the objector given in the notice of objection, is sufficient; secondly, supposing it is not so per se, whether it is rendered sufficient by the fact of its being the same as that given in the list of voters published by the overseers.

First, it is submitted that the objector has sufficiently complied with the form given in schedule (A) No. 5, to the 6 & 7 Vict. c. 18, referred to by sect. 7. That form concludes thus: "(Signed) A. B. of (place of abode) on the register of voters for the parish of ——"(2).

The objector here has described himself as "of Poplar Grove, Didsbury, on the register of voters for the township of Manchester." The only difference between the two is, that the objector, in order to make his notice square with the fact, has substituted the word "township" for that of "parish" given in the form. The Court are bound to take notice of the existence of a township (3).

(TINDAL, Ch. J.: Is that so? We are bound to take judicial notice of a county (4).)

[\*14] (The learned counsel was proceeding to \*read a description of the township of Manchester, from the Parliamentary Gazette; but Tindal, Ch. J. said they could not receive it as an authority.)

- (1) The Court intimated, that as by the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18, s. 60), they were directed to hear appeals in the same manner as special cases, they should hear only one counsel on each side.
- (2) The forms now in use are Form No. 5 (a) and (b) in Schedule I. of the

Registration Order, 1895. Those forms conclude thus: "(Signed) A. B. of [place of abode] on the register [or

list] of electors for the parish [or township] of ."—J. G. P.

- (3) Nul tiel vill is matter to be pleaded.
- (4) See 2 Inst. 557; Com. Dig. tit. County (A.).

The Revising Barrister considered the notice also objectionable, upon the ground that the description of the objector's place of abode was WARBURTON. insufficient, and that "Lancashire" or "near Manchester" should have been added. But there is no reason for such an addition: and the latter one suggested would not have been sufficient, according to the Revising Barrister's own view, as it would have been necessary to have said "near Manchester, in the county of Lancaster." A party must be on the list of voters in order to be entitled to object. It may be that more particularity is required in the case of a claimant.

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(TINDAL, Ch. J.: According to the form, the objector, certainly, is only required to state his place of abode, and that he is on the list of voters for a particular parish.)

\* \* As to the second point, the objector's place of abode is required to be given solely for the purpose of his identification.

Cardwell, for the respondent:

[ 15 ]

The question here is, not so much, whether the notice of objection is sufficient in point of fact, as whether there are facts sufficiently stated in the case from which the Court must infer that the Revising Barrister was wrong. The Revising Barrister has, in effect, found that the description given was not sufficient. There may possibly be two or three Didsburys in England; and something was requisite to fix the particular place intended.

As to the second point, the inference is that the place of abode to be given in the notice of objection, should be the actual place of abode of the objector, and not the place of abode stated in the list of voters; for otherwise the form would have been, "described in the list of voters as of," &c.

Cockburn, in reply:

[ 16 ]

It is sufficient if the description given of the objector's place of abode will enable the party objected to to find him out.

(MAULE, J.: By the 6 & 7 Vict. c. 18, s. 7, the notice of objection is required to be in the form given, "or to the like effect.")

With regard to a change of residence, the party would, in such an event, be bound to send in a fresh claim, if he was within the time limited by the Act.

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[ \*17 ]

(COLTMAN, J.: He might have changed his place of abode after WARBURTON. the list was made out and published.)

> Still, a description of the former place of abode would be sufficient to identify him. If the place of abode in the notice were different from that in the list, the party objected to might think the objector was not entitled to object, and might not appear before the Revising Barrister.

#### TINDAL, Ch. J.:

I think the proper test to which the sufficiency of this notice ought to be brought is, to try it by the form given in the schedule (A.) No. 5, to the 6 & 7 Vict. c. 18, and compare them together. (His Lordship read the form in the schedule, and the notice set out in this case.) There is clearly no variance upon the ground that the objector has described himself as being on the list of voters for a "township" instead of a "parish"(1). All that the seventh section of the Act requires is, that the notice is to be "to the like effect" with the form given. Inasmuch, therefore, as there is a list of voters for the township of Manchester, the notice is correct in this respect.

With respect to the description of the place of abode, there is also an exact compliance with the form. The place of abode is sufficiently described if it be truly \*described. A place of abode is not necessarily to be described as in a parish. That is old law. Com. Dig. tit. Abatement (2). It is said that there may be two or more Didsburys, and, therefore, that "Lancashire" should have been added; but non constat, there may not be two or more Didsburys in that county. The respondent, at least, should have shown that he had been misled, or put to some inconvenience, by the notice in its present form; but nothing of that kind is suggested (3). It seems to me, therefore, that sufficient has been done, and that the decision of the Revising Barrister must be reversed.

- (1) See note 2, p. 642.
- (2) (F. 25).
- (3) A latent ambiguity arising out of the existence of other places bearing the same name was not alleged, and is not to be presumed. But if it had been shown that there was another place of the name of Didsbury in a different or in the same county, a

question might have been raised as to the sufficiency of the notice of objection, whether the voter had been actually misled by it or not. ambiguous notice cannot be set right by a verbal communication; neither, as it would seem, can it be made good, ex post facto, by the sagacity of the party to whom it is addressed.

#### COLTMAN. J.:

GADSBY

We must construe the schedule to the Act in a reasonable manner. Warburton. The object of the notice is, to give the party objected to, reasonable information where the objector is to be found. When the place of abode of the latter, given in the notice, is the same as that in respect of which his name stands upon the list of voters, it must be taken that there are abundant means to identify him; and a more particular description is not necessary. If the objector had changed his abode after the list was made out, that might have given rise to a different question; and perhaps in such a case he ought to have afforded further information; but that is not the case here, where there appears to be no difficulty or doubt as to the identity of the objector.

#### MAULE, J.:

[ 18 ]

Although the Revising Barrister has found that the description of the objector in his notice was not sufficient, that may be matter of law. He has, however, stated facts from which it appears the 'description was sufficient. The question, whether he was right, is therefore regularly raised for our decision.

The seventh section of the Registration Act requires a notice of objection to be given "according to the form numbered (5) in the schedule (A.), or to the like effect." In that form, the words "place of abode" are in a parenthesis, after the words "A. B. of," in order to show that the place of abode is there to be inserted. And it seems to me that this means the place of abode as inserted in the list of voters, in order to show that the objector is on that list and entitled to object; it being absolutely necessary that the place of abode of a voter should appear on the list. Whether it would be necessary in the case of a change of abode after the list had been published to insert the latter place of abode in the notice of objection, it is not necessary to decide. The inclination of my own mind is, that it would not be necessary. I am confirmed in this opinion by the expression in the form—"A. B. of," &c. The word "of" is indicatory rather of a place of which a party is described, than of a place from which a notice is sent. In the latter case, the place is generally put without the addition of the word "of" and is used as a date. For instance, in the form given in No. 4 in the same schedule, the word "of" is not put; but it ends thus "(Signed) A. B. (place of abode)." In the form of notice under consideration, I think it was meant that the place of abode should be stated as given

GADSBY [ \*19 ]

in the list of voters (1). The \*seventh section says, the notice is WARBURTON, to be "to the like effect," with the form given in the schedule. What is the meaning of that? To effectuate the object intended by the notice; namely, to show that the objector is on the list of voters.

#### ERLE. J.:

It appears to me also, that the Revising Barrister was wrong in his decision, and upon both points.

The first question is, whether the description of the objector, as being on the list of voters for a township, is of necessity, wrong; and I quite agree in thinking, it is not. On the second ground, I am of opinion that the decision of the barrister was clearly wrong. He seems to have thought that the place of abode of the objector should be stated differently in the notice of objection, from that which appeared in the list of voters. It appears to me, that the "place of abode" required to be stated by the Act, has the same meaning in both instances; and this, as well under the Reform Act as under the \*Registration Act (2). And it is extremely convenient that the same description should be given; the main object of the description being that the voter may be enabled to ascertain that the objector has a right to object (8). I am even inclined to think

[ •20 ]

(1) In this case, as the place of abode of the objector was sufficiently described in the list of voters, it was unnecessary to decide whether, supposing the description in the list of voters to be wholly defective, a notice of objection, following that description, would be sufficient. The reasonableness of laying down the rule so generally may well be doubted. a person, e.g., John Smith, sent in a claim for a county vote, in which he stated his place of abode to be "London," or, if in a London list, the column headed "place of abode" were so filled up, the Revising Barrister would be bound to expunge the name by reason of the insufficiency of the description of the place of abode, unless a better description were supplied at the time of revision. It is difficult to see the ground upon which such a fallacious description of the place of abode in a notice of objection,—showing a patent ambiguity,—

could be held good, merely because it corresponded with the equally vague statement of the objector's place of abode as appearing on the list of voters.

The case of a latent ambiguity may be different. Supposing it to be proved that there were two or more Didsburys situated in a distant county, that might be a fact unknown to the party, and it would be a hardship to deprive him either of his vote or of his right of objection, when he had, to the best of his information, complied with the requisites of the Act.

- (2) 6 & 7 Viet. c. 18, s. 7.
- (3) Another, and not an unimportant, object may be, that the voter shall have an opportunity of communicating with the objector, when, upon a proper explanation, either the claim or the objection may be abandoned without further trouble and expense being incurred.

that if the objector retained the same place of abode as that GADSBY mentioned in the list, and purposely changed the description in his WARBURTON. notice by adding the parish, it might be invalid.

Decision reversed.

# JOHN GADSBY v. JAMES BARROW (1).

(7 Man. & G. 21-28; S. C. 8 Scott, N. R. 799; 14 L. J. C. P. 51; 8 Jur. 1031.)

A tenant who holds, under two different landlords, two different sets of premises, the rent of each being less than 50% a year, though together they amount to more than that sum, is not entitled to a vote under the Registration of the People Act, 1832 (2 Will. IV. c. 45), s. 20.

Not. 18. Southern Division of Lancashire.

[ 21 ]

1844.

THE respondent's name appeared on the list of persons claiming to be entitled to vote, &c. in respect of property situate within the township of Pailsworth, being a township within the polling district of Manchester. The respondent was objected to by the appellant.

The qualification in respect of which the respondent claimed to be entitled to vote, was described in the column of the said list headed "Nature of qualification," in the following words and figures, namely "Occupation of land and buildings, at a rental of 50l. and upwards."

It appeared in evidence that the respondent occupied land and buildings, for which he paid fifty-five pounds a year, under two different landlords, to one of whom he paid a rent of thirty-five pounds per annum and to the other a rent of twenty pounds per annum; and that he occupied the said land and buildings as tenant. and was, and is, bona fide liable to the several yearly rents aforesaid, amounting together to fifty-five pounds a-year, but that he did not occupy as tenant, under one and the same landlord, any lands or tenements for which he was or is bona fide liable to pay, to the same landlord, a yearly rent of not less than fifty pounds.

It was contended, on behalf of the appellant, that, the occupation by the respondent not amounting to a yearly renting of fifty pounds

(1) This case turned upon the words in s. 20 of the Reform Act, 1832, "who shall occupy as tenant any lands or tenements for which he shall be bond fide liable to a yearly rent of not less than 50%." These words were repealed (subject to certain exceptions) by 48 & 49 Vict. c. 3, s. 12; and by s. 5 of that Act, the substituted qualification is "occupying any land or tenement . . . of a clear yearly value of not less than ten pounds." Compare Wood v. Hopper (1875) 1 C. P. D. 192, 45 L. J. C. P. 108, a decision upon the words "free land or tenement to the value of 40s." in 8 Hen. VI. c. 7. See also Huckle v. Piper (1871) L. R. 7 C. P. 195; 41 L. J. C. P. 42, and Dewhurst v. Feilden, post, p. 696. **J.** G. P.

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[ \*22 ]

[ \*23 ]

under any one landlord, he could not unite the two occupations and rents, so as to qualify \*him to vote as occupying tenant of lands or tenements for which he was bonâ fide liable to a yearly rent of not less than fifty pounds.

I was of opinion that the respondent was an occupier of lands or tenements for which he was and is bonâ fide liable to a yearly rent of not less than fifty pounds, within the meaning of the statutes 2 Will. IV. c. 45, and 6 & 7 Vict. c. 18; and I retained his name on the said list of voters accordingly.

The question for the opinion of the Court is, whether, under the circumstances mentioned and set forth in the above statement of facts, the name of the respondent was rightly retained on the said list of voters.

If the Court are of that opinion, the register of voters for the said division is to stand without amendment; but if the Court are of a contrary opinion, then the said register is to be amended by expunging the name of the respondent therefrom.

(Signed) R. M., Revising Barrister.

### Cockburn, for the appellant:

The question here turns upon the twentieth section of the 2 Will. IV. c. 45, by which it is enacted, inter alia, "that every male person &c. who shall occupy, as tenant, any lands or tenements for which he shall be bona fide liable to a yearly rent of not less than 50l. shall be entitled to vote, &c. for the county, &c. in which such lands or tenements shall be situate." And the question is, whether if a party occupy several distinct tenements for which he pays rents amounting to 50l., but not one rent of that amount to the same landlord, he is entitled to vote. The appellant relies upon the words of the statute, which speaks of a rent. Such rent cannot be made up of rents payable in respect of several holdings under different landlords. It must be one entire rent. Under the twenty-seventh section land may be united with \*a building in order to confer a vote in a borough; but in the case of a tenant, the holding must be under the same landlord. This provision shows the importance attached to the tenancy being under the same landlord. It has been held (1) that a party cannot join together a house and other building for the purpose of acquiring the franchise: Sweetman's case (2). And this is equivalent to holding that where

<sup>(1)</sup> Under the Irish Reform Act, (2) Alcock, Reg. Ca. 27. 2 & 3 Will. IV. c. 88, 8, 7.

a term is used in the singular number, it is not competent to a party to unite different instances of the same qualification mentioned in the Act.

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## Cardwell, for the respondent:

The words of the Act are not to be construed in the strict manner contended for on the other side. The spirit of the enactment is to be taken into consideration. The meaning of the section is, that the voter must hold lands, &c. for which he pays rent to the amount The fact of his holding them of the same landlord is immaterial. The twenty-seventh section makes this clear beyond a doubt; for there the Legislature has shown that the distinction was present to their minds, between holding under the same and under different landlords. Sweetman's case turned upon a difference in the wording of the Irish and English Reform Acts. The word "building" which is in the English Act (2 Will. IV. c. 45, s. 27) is not in the Irish Act (2 & 8 Will. IV. c. 88, s. 7); and it is consistent with principle that a clause omitting certain terms, is not to be construed in the same manner as one in which they are inserted. There have been analogous cases under the 6 Geo. IV. c. 57, which enacts "that no person shall acquire a settlement by reason of renting a tenement &c. unless such tenement, &c. shall consist of a separate and distinct dwelling-house &c. at and for the \*sum of 10l. a year, &c. nor unless the rent for the same, amounting to 10l. be actually paid;" and it has been held, that though the word "rent" was in the singular number, it included several rents paid to different landlords: Rex v. Tadcaster (1); Rex v. North Collingham (2). The object of the Reform Act, which is an enfranchising statute, and therefore to be construed liberally, was to ascertain the independence of the voter by the amount of rent paid by him.

Cockburn, in reply:

The settlement cases that have been cited, have no application to the present case. The ground of the decision in Rex v. Tadcaster was thus explained in Rex v. Wootton (3), that before the 59 Geo. III. c. 50 (which contained an enactment similar to that which is to be found in the 6 Geo. IV. c. 57), almost anything was considered to be a tenement for the purpose of conferring a settlement, and that

[ \*24 ]

<sup>(1) 4</sup> B. & Ad. 703.

<sup>(3) 1</sup> Ad. & El. 232; 3 N. & M. 312.

<sup>(2) 1</sup> B. & C. 578.

GADSBY v. BARROW. the object of the 59 Geo. III. c. 50, was to remedy that state of things by defining what was meant by a tenement. The object of the Poor-law Acts is, however, very different from that of the Reform Act. It is argued, on the other side, that because the twenty-seventh section of that Act provides for the case of a holding under the same landlord, the omission of such a provision in the twentieth section shows that two or more holdings under different landlords may be joined together; but in the twenty-seventh section the only question is, as to the value of the premises and not the rent; whereas in the twentieth section the terms used imply, ex vi termini, that the holding should be at one undivided rent.

#### TINDAL, Ch. J.:

[ \*25 ]

The question in this case turns upon the construction to be put upon the latter part of the \*twentieth section of the 2 Will. IV. c. 45, which gives, for the first time, a new right of voting in counties at elections of members of Parliament in three different instances. The one now in question, which is the third, depends upon these words, "who shall occupy, as tenant, any lands or tenements for which he shall be bonâ fide liable to a yearly rent of not less than 50l." The meaning of these words, I think, is, that the tenant is to be liable to a single rent of not less than 50l. If it had been intended that divers rents might be joined to make up that sum, it would have been easy to use the words, "a yearly rent or rents of not less than 50l." The word "rent" does, in point of law, denote a redditus for one demise.

It is of importance to see to whom the section gives the right of voting in the two other cases. In the first, it is given to any person "who shall be entitled, either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years (whether determinable on a life or lives, or not), of the clear yearly value of not less than 10l. over and above all rents and charges payable out of, or in respect of, the same." In that case there can be no doubt that the requisite holding could not be made up of distinct and different terms, each of a smaller value than 10l. So, with regard to the second instance, of a tenancy "for the unexpired residue, whatever it may be, of any term originally created for a period of not less than twenty years, (whether determinable on a life or lives,

or not,) of the clear yearly value of not less than 50l. over and above all rents and charges payable out of, or in respect of, the same." In both of these instances the description is of a right to vote in respect of a single term. Then comes the third case, which is now under consideration. \*And I can see no reason why the Legislature, in this case, should have contemplated a tenure under different landlords, when in the former cases it is required to be under the same landlord. If, therefore, this clause is taken alone. it appears to me that the party must show a liability to a single rent. And, adverting to the twenty-seventh section, I think the difference of the wording of that clause rather supports the construction I have laid down with respect to the twentieth section. In the twenty-seventh section there is no mention of rent. The words are, that every person "who shall occupy &c., as owner or tenant, any house &c., being either separately, or jointly with any land &c., occupied therewith by him as owner, or occupied therewith by him as tenant, under the same landlord, of the clear yearly value of not less than 10l." And as the value in that case is the measure of competency, it may have been thought necessary to say that where a building and land may be joined together, the tenancy must be under the same landlord. It is to be remarked also that the 6 & 7 Vict. c. 18, s. 78, recites that part of the twentieth section of the former Act, which is now under consideration; and I think it may fairly be supposed that if there had been any intention to alter the right of voting in any respect, it would have distinctly appeared. The seventy-third section of the latter Act does provide for cases of successive occupation and of joint occupation by different tenants, but, in speaking of the rent, still observes the singular number.

Upon the whole, I am of opinion that the present party is not entitled to a vote, and that the decision of the Revising Barrister was wrong.

# COLTMAN, J.:

If we look merely at the words of the clause in the twentieth section of the 2 Will. IV. c. 45, which speaks of "a yearly rent of not less than 50l." \*I think that if a party occupies premises under two different landlords, the one set at a rent of 40l. a year, and the other, at 10l., he does not occupy any premises at "a yearly rent of not less than 50l." Is there, then, any thing in the section itself, or in the rest of the Act, to show that an occupation under

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\*26 ]

[ \*27 ]

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[ \*28 ]

different landlords was contemplated? I own I do not see anything of the kind. It may be that the Legislature intended that a tenant should not be subject to the conflicting claims of two different landlords; in which case he might be exposed to the torture of not knowing to which of them he owed allegiance. It is provided in the twenty-seventh section, that the land which may be joined with a house, or other building, in order to confer a vote for a borough, must, if occupied by the party as tenant, be held under the same landlord. That, I think, fortifies the view we are taking of the twentieth section. I am of opinion that the respondent is not entitled to vote.

## MAULE, J.:

I also am of opinion that the respondent is not entitled to vote, as there is no occupation by him of any lands in respect of which he is liable to a yearly rent of not less than 50l. within the words of the twentieth section of the 2 Will. IV. c. 45. The respondent occupied two portions of land, for one of which he was liable to a yearly rent of 35l., and for the other to a different rent of 20l. party takes land at a rent of 50l. a year, he is liable to that rent in respect of every inch of the land he has so taken. The words of the twentieth section appear to me to be very clear; and we must presume they were intended to be used in their plain sense. It is observable that this section confers the right of voting in respect of the liability to pay a certain rent; it is not the value of the land, or the payment of the rent, which is the criterion; and this is very peculiar. Where the franchise is given in respect of \*the value of the land occupied, the case is very different. There, the right would appear to be intended to be conferred in respect of the value, although made up of several items.

The various settlement cases that have been referred to have not much bearing upon the present case. They have a very different scope from the question here.

I think, therefore, that the name of this voter was improperly retained on the list.

# ERLE, J.:

I am of the same opinion. The twentieth section of the 2 Will. IV. c. 45, gives a qualification in respect of leasehold property; first, to tenants for sixty years, at a 10l. rent(1); secondly, to

(1) See the argument in Hopkins's case, Delane, 202.

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tenants for twenty years, at 50l. rent; and, thirdly, to tenants from year to year at a 50l. rent (1); and I think that in all these cases it was meant that the holding should be under one tenancy at one rent. I am fortified in this opinion by a reference to the twenty-seventh section, where the value of the premises is mentioned; which value might be made up of different holdings, but for the enactment that where a building and land are joined together, they must, in order to confer the franchise, be held under the same landlord. With respect to the recent poor-law statutes, the whole tenor of their enactments, shows that the Legislature intended one tenement to confer a settlement. But the analogy to be drawn from those statutes is not very cogent.

Decision reversed (2).

## CUMING v. TOMS.

(7 Man. & G. 29-34; S. C. 8 Scott, N. R. 827; 14 L. J. C. P. 54; 8 Jur. 1052.)

Under the Parliamentary Voters' Registration Act, 1843 (6 & 7 Vict. c. 18), s. 100, a notice of objection may be posted by an agent for the objector.

And the objector himself may produce the stamped duplicate of the notice, before the Revising Barrister, although the notice was posted by an agent.

Francis Brooking Cuming, of Fore Street, in the list of voters for the parish of Totnes, in the borough of Totnes, objected to the name of Francis Coaker being retained on the list of persons entitled to vote in the election of members for the said borough.

A paper writing, hereunto annexed, purporting to be a duplicate of the notice of objection stamped at the post office on the 21st day of August last, was produced before me. The said paper had been signed by the said objector, and compared by him with the original notice, and both were addressed to the voter at his place of abode as described in the said list, and both were delivered by him to James Bosson Taylor, his clerk, to take to the post office on the said 21st day of August.

The said James Bosson Taylor immediately left the office of the said objector, taking with him the said paper and notice, and returned within the space of a quarter of an hour with the said

unusual case of a party holding two or more tenements, by successive takings from the same landlord, and even to a case where several tenements are held by the same demise, but with separate renders. 1844. *Nov*. 18.

Borough of Totnes.

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<sup>(1)</sup> See the argument in Mann. Notes of Revision Cases, 2nd ed., p. 180, &c.

<sup>(2)</sup> The principle of entirety of rent, upon which this case was decided, if carried out, will apply to the not

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Toms.

[ \*30 ]

paper stamped with the said post-office stamp "21st August, 1844." The said notice would, in the ordinary course of the post, have been delivered at the place of abode as described in the list on or before the 25th day of August last. James Bosson Taylor, being confined by illness, was unable to attend before me.

It was objected on the part of Francis Coaker, that as such alleged duplicate was produced by the objector himself, and not by the said James Bosson Taylor, the \*party by whom the notice had been posted, the service of the said notice was not duly proved; and I being of that opinion, retained the name of the voter on the list. The voter did not prove his qualification.

The cases of eleven other parties were consolidated with the principal case.

The question for the opinion of the Court is, whether, under the circumstances mentioned in the above statement, the name of Francis Coaker was rightly retained on the said list.

If the Court are of that opinion, the register is to stand without amendment. If the Court are of a contrary opinion, then the register is to be amended by expunging therefrom the name of Francis Coaker.

(Signed) J. L. L., Revising Barrister.

Cockburn, for the appellant:

The question in this case arises under the 100th section of the 6 & 7 Vict. c. 18 (1), by which it is enacted that whenever any person shall be desirous of sending a notice of objection by post, he shall deliver the same open, and in duplicate to the postmaster; "and the production by the party who posted such notice, of the stamped duplicate, shall be evidence of the notice having been given." The question is, whether the stamped duplicate of notice must necessarily be produced before the Revising Barrister by the identical party by whom the notice was posted. The obvious intention of the section was, that the objector should be enabled to avail himself of the stamped duplicate; and the production of that duplicate is made sufficient evidence of the notice having been given.

(TINDAL, Ch. J.: It seems that credit is given to the stamp.)

[ \*31 ] Great inconvenience would otherwise result, \*and the provisions of

(1) See Cooper v. Contes, 58 R. R. 233 (5 Man. & G. 98).

the statute, as to this mode of serving the notice, would be rendered nugatory.

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Kinglake, Serjt., for the respondent, was then called upon:

The argument on the part of the appellant, assumes that the production of the stamped duplicate is the only material fact to be considered; but the day and the hour when, and the place where, the notice was posted, are also material: it must be posted so as to be delivered in due course.

(TINDAL, Ch. J.: That would be matter of evidence before the Revising Barrister.)

It could not be ascertained without fixing the time when the notice was posted; and that could only be proved by the party who posted it. It may also be important to show that the regulations as to registration &c., which may be made by the postmaster, have been complied with.

(Tindal, Ch. J.: What is the meaning of the stamp that is to be affixed to the duplicate? That would bear the date when the notice was posted.

MAULE, J.: It must mean the appropriate stamp, one which would show when the notice was posted.)

This production of a stamped duplicate is a substitute for the former proof of service of notice, which must have been by leaving it at the place of abode of the party objected to (1); in which case, in order to prove the service, it was necessary to give notice to produce the original notice (2), and, in the event of its non-production, to call the party by whom the notice was served. Part of this difficulty has been got rid of by the present enactment; inasmuch as another method of service has been introduced; \*but the party by whom that service was effected must still be called. Assuming that the stamp upon the duplicate would point out the place, and the day and hour when the notice was posted, still, as this is a statutory notice, it must be construed strictly. Throughout

[ \*32 ]

called a notice, has a distinct legal operation. Thus, a notice to quit does not merely convey information as to the approaching termination of the tenancy, but is, itself, the determining act.

<sup>(1)</sup> See 2 Will. IV. c. 45, ss. 39, 47; 6 & 7 Vict. c. 18, ss. 7, 17.

<sup>(2)</sup> The rule that it is unnecessary to give notice to produce a notice, does not appear to be properly applicable to cases in which the instrument, though

CUMING v. Toms. the Registration Act, where personal service is required, the words "deliver or cause to deliver" are used. In giving notice by post, it was clearly intended that the objector himself should be the party to post the notice.

(Erskine, J.: Is that objection raised upon the case?)

It is involved in the other point.

(Tindal, Ch. J.: If that be the true construction of the Act, a party who was labouring under a fit of the gout could not make an objection.)

He might adopt the other mode of service, by an agent. In sect. 3 it is said, that the clerk of the peace shall "cause to be delivered" his precept to the overseers; in sect. 7, which relates to the notices of objections in counties, it is said, "the objector shall give, or cause to be given, to the person objected to, or leave or cause to be left, at his place of abode, a notice," &c.; by sect. 10, the town-clerk is to "cause to be delivered" his precept to the overseers; and in sections 47 and 48 there is a distinction between the "transmission" and the "delivery" of the revised lists by the Revising Barrister. It is submitted, therefore, that the delivery of the notice to the postmaster, should be by the hands of the objector himself; and that, at all events, it is necessary that the party who posted the notice, should personally attend before the Revising Barrister, to prove the fact of such posting.

#### TINDAL, Ch. J.:

I can see no reason why the general maxim, which is of almost universal application, qui facit per alium, facit per se, should not apply in this case. If any inconvenience had been pointed out as likely to result from the application of that maxim in \*this case, the question would have assumed a different shape. It appears, when the stamped duplicate is produced before the Revising Barrister by the proper party, that faith and credit are given to the stamp affixed at the post-office. The party who posts the notice may be the principal, that is, the objector himself, or an agent employed by him for that purpose; and I also think that the party who produces the stamped duplicate before the Revising Barrister may be either the agent who actually posted the notice, or the principal who sent it to be posted. This construction is

[ \*33 ]

consistent with reason and is not inconsistent with the actual terms of the section.

CUMING TOMS.

#### COLTMAN, J.:

Upon a former discussion as to the meaning of this section (1), whether a delivery at the post-office was sufficient without proving that the delivery had been made to the postmaster himself, the question was open to some difficulty; but it was ultimately held that such a delivery was sufficient. That decision is an authority for the conclusion to which we now come. No inconvenience from the course pursued on this occasion has been suggested; and no satisfactory reason has been given why the objector himself should deliver and post the notice of objection; or why, when posted by an agent, he should not produce the stamped duplicate before the Revising Barrister.

### MAULE, J.:

It would require very strong words in the statute, or the conviction that manifest inconvenience would result from a contrary course, to satisfy me that the delivery of the notice of objection at the post-office must be made personally by the objector himself. There is nothing in the language of the Registration \*Act (2), neither has any inconvenience been suggested, to lead me to such a conclusion. I think our present ruling is quite in conformity with previous decisions; and if we were to decide otherwise, it would lead to a very inconvenient rule. The object of the section (3) is, that the production of the stamped duplicate shall be sufficient evidence before the Revising Barrister of the proper service of the notice of objection.

## ERLE. J.:

I am of the same opinion. The statute says that the party objecting shall deliver the notice of objection to the postmaster (3). I think there is a sufficient compliance with this requisition if the notice is posted by an agent. It is further said (3) that the production, by the party who posted such notice, of a stamped duplicate shall be evidence of such notice having been given; and I think it is also sufficient if the objector produces the stamped duplicate, though it was posted by an agent. And this, upon the principle,

[ \*34 ]

<sup>(1) 58</sup> R. R. 233 (Cooper v. Cvates, 5

<sup>(2) 6 &</sup>amp; 7 Vict. c. 18.

Man. & G., p. 98).

<sup>(3) 6 &</sup>amp; 7 Vict. c. 18, s. 100.

CUMING TOMS.

qui facit per alium, facit per se. The words "caused to be delivered," &c., which have been referred to, in other parts of the statute, are only used for greater caution.

Decision reversed.

1844.

Nov. 19.

Borough of Wakefield. [ 35 ]

### NETTLETON " BURRELL.

(7 Man. & G. 35-36; S. C. 2 Dowl, & L. 598; 8 Scott, N. R. 738; 14 L. J. C. P. 37: 8 Jur. 1033.)

Where a Revising Barrister having assented to the substance of a special case agreed upon between the parties thereto, died without having finally settled the terms in which the statement should be made, the Court refused to allow the case to be entered.

Whether, supposing the assent of the Revising Barrister to have been given to the special case in its terms, the Court would allow the case to be entered without his signature after his death, quære.

KINGLAKE, Serjt., within the first four days of Term, applied for permission to enter the appeal in this case; but the Court being of opinion that the affidavit upon which he moved was not sufficient, he obtained leave to renew the application upon an amended affidavit.

He now applied accordingly upon an affidavit which stated the following facts: At the last revision of the lists of voters for the borough of Wakefield, the appellant objected to the name of the respondent (amongst others) being retained upon the list; but the Revising Barrister disallowed the objection, and the names were retained. Due notice of an intention to appeal was given to the Barrister, and he consented to grant a case for the opinion of this Court, and desired the parties on both sides to prepare a statement of the facts for him to examine and settle. A statement of facts was accordingly, the same day, agreed upon, drawn up, and signed by the appellant and respondent: it was handed to the Barrister, who expressed his approval of the statement, but returned it to the parties, with a recommendation that they should make some formal alterations. The parties accordingly remodelled the case in the form suggested, and the appellant having subscribed the declaration required by sect. 42 of the 6 & 7 Vict. c. 18, sent it The latter died shortly afterwards; and the to the Barrister. statement of the case was found in the above state, and without his signature, among his papers, after his death.

The learned Serjeant submitted that the provisions of the 6 & 7 [ 86 ] Vict. c. 18, s. 42, were merely directory; and that the absence of the signature of the Revising Barrister was immaterial, as the facts

disclosed by the affidavit sufficiently showed that he had substantially approved the statement of the facts, and that the alterations which he required were merely formal.

NETTLETON v. Burrell.

Channell, Serjt., contrà, was not called upon.

TINDAL, Ch. J.:

The first step requisite to support the present application does not appear to be made out; as from the affidavit, it is far from clear that the Revising Barrister had, in fact, approved of the case, as stated by the parties. Supposing even that the signature of the Barrister might be dispensed with, his approbation of the statement undoubtedly could not be. The presumption appears rather to be that he did not quite approve of the statement; or, at least, that he entertained some doubt concerning it. Possibly he may have intended to make some alteration before signing it: otherwise he would in all probability have signed it at once. As the statement was not finally settled by the Barrister, the whole matter appears to have been still in fieri. The case therefore is not within our jurisdiction.

The other Judges agreed.

Per Cubiam:

Permission to enter the appeal, refused.

#### DAVIS v. WADDINGTON.

(7 Man. & G. 37-49; S. C. 8 Scott, N. R. 807; 14 L. J. C. P. 45; 8 Jur. 1142.)

The trustees of an almshouse were empowered by letters patent of incorporation to appoint and remove twenty-four inmates, "totics quoties sibi conveniens fore videbitur."

Held, that the inmates appointed under this power, did not take an estate for life in the property enjoyed by them as such inmates, and were, therefore, not entitled to be registered as freeholders (1).

THOMAS WADDINGTON duly objected to the name of Thomas Davis, which appeared on the list of claimants for the parish of Rothwell, as follows:

Davis, Thomas . Rothwell. Freehold houses and gardens, as principal of Jesus Hospital. Emoluments arising out of freehold houses and lands belonging to Jesus Hospital, Rothwell, in the occupation of himself and Robert Hafford and others.

(1) See the next case.

1844. Nov. 21.

County of Northampton, Northern Division.

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[ \*38 ]

He also duly objected to the name of Robert Burbridge, which appeared on the same list as follows:

He also objected to twenty-three other names appearing on the said list, whose qualifications were described in like manner.

Owen Ragsdale, deceased, left his estate, for founding an hospital at Rothwell, to five trustees who were incorporated by the name of the Governors of Jesus Hospital, \*Rothwell, by letters patent, bearing date the thirty-eighth year of Elizabeth. The governors receive the rents of the estate, and pay to the principal and inmates of the hospital as follows: To the principal, 35l. per annum, and to each inmate 6s. per week. There are now twenty-six inmates, two having been added to the original number of twenty-four, by recommendation of the Charity Commissioners.

In accordance with the bye-laws made by the original governors, and now in force, the principal is elected by the majority of governors, and the inmates by such governors in rotation. The appointments are made in writing, and are generally in the following form:

"To —, principal of Jesus Hospital in Rothwell, in the county of Northampton.

"Whereas —, a poor man late of your said hospital is dead, you, the said principal, are hereby to admit — in the — in the hundred of — in the said county, into your said hospital, in the room and place of the said —, deceased, it being my turn, as one of the governors thereof, to appoint a poor man to be placed in the said hospital upon a vacancy; and for so doing this shall be to you a sufficient warrant.

"Given, under my hand and seal, this — day of — 18—."

No instance is recorded of any principal or inmate having been expelled the hospital.

The principal has a house and garden within the hospital, and each inmate, on his appointment, is provided with a room and piece of ground, for his own separate use, of the value of more than 40s. per annum, which is generally the room and garden of

the person whose death gave occasion for his appointment; but the principal exercises a discretion as to the room which the new comer is to use.

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There are also four halls in common to the inmates.

[ 39 ]

The charter of incorporation sets forth the power of the governors then being, and their successors and a majority of them "to elect, nominate, and assign, appoint, licence, deprive, expel, and remove the said principal, and twenty-four poor and infirm men in the said hospital called Jesus Hospital in Rothwell, in the county of Northampton, from time to time to be placed there for the time being, or either of them so often as it shall seem to be convenient to them, or the greater number of them" (totics quoties sibi, aut eorum numero majori, conveniens fore videbitur).

The said charter further declares that the "Governors shall be able to make fit and wholesome statutes and ordinances in writing concerning and touching the nomination, election, order, government, punishment, expulsion, amotion, and direction of the said principal and twenty-four poor infirm men, and every of them; and concerning and touching the stipends and salaries of the same principal, and twenty-four poor and infirm men, and every of them; and concerning and touching the order and government, demising, leasing, disposition, recovery, and defence and preservation of the manors, messuages, lands, tenements, and hereditaments, goods, and chattels of the said hospital."

It then gives the same powers to the successors of the said governors, and declares that such statutes and ordinances shall not be repugnant, contrary, or derogatory to the laws, statutes, rights, or customs of the kingdom of England.

In pursuance of the powers granted by the charter, the original governors made bye-laws or statutes for the election, government, and removal of the principal and poor men in the hospital: by which it is ordained, that no principal, or poor man, shall be eligible to be admitted unless he be forty years of age at the least, and \*be unmarried; nor shall they, being admitted, continue in the said hospital unless they continue to be unmarried. The said statute also ordains that when any of the poor or sick men shall die, resign, give over his place, or, for any offence or other lawful and reasonable cause, be removed," the principal shall give notice to the governor (whose turn it is to nominate a poor man) of the same. The statutes relating to the removal of the poor men, order that every poor man dwelling in the hospital, shall work at any

[ \*40 ]

DAVIS r. Waddington. trade, according to his strength, that is not noisy or noisome, and by no means give himself to "idleness, drunkenness, vagrant life. or begging; and the principal shall inquire, and report to the governors, which of the said poor or sick men shall be idle, and which shall resort to the ale-house or place of great disorder, to the intent that all the said governors,—or such governors, which, with the most part of the assistants (1), shall assemble at the said house at some convenient time by any of the governors appointed therefore, after reasonable notice of that time given to all the rest of governors and assistants for the time being, to examine the cause,—may instantly inflict such punishment upon the offenders, by abatement of their wages, expulsion, or otherwise, as they shall think that the offence shall deserve."

It was objected that the claimants had no estate which entitled them to have their names retained upon the list, inasmuch as the power of amotion by the governors, contained in the charter of incorporation, and not exhausted or limited by the bye-laws, prevented them from acquiring any estate of freehold by virtue of their appointment.

[41] I decided in favour of the objection, and expunged the names from the list. (The cases were consolidated.)

(Signed) J. M., Revising Barrister.

# Maunsell, for the appellant:

The appointment of the principal and inmates of the hospital must be presumed to be an appointment for life, defeasible on certain conditions; they are therefore tenants for life. It is true, that by the charter of Elizabeth, the governors have the power of removing the inmates "as often as it shall seem to be convenient to them;" but the term "convenient" had not the same meaning then as now. It now means commodious. In Ainsworth's dictionary the word conveniens is rendered "meet, suitable" (2). The meaning of the charter, therefore, is, that the inmates may be discharged

(1) The assistants are elected by a majority of the governors, and have no voice in appointing the poor; the governors elect a governor on death or resignation, from the assistants.

(2) So, in Terence, Eun. iii. 2, 41, "Haud convenit" &c.

The legal meaning of the term "convenient" at the period of the charter, may be rendered by the words

"proper" or "just," and "inconvenient" by the words "improper" or "unjust." Hence, these legal maxims, "Nihil quod est inconvenient est licitum," "The law will sooner suffer a mischief than an inconvenience;" i.e., it is better that damage should be incurred, than that injustice should be perpetrated.

only upon suitable or proper occasions, such as their misconduct would give rise to. This, consequently, is not like an appointment durante bene placito. The bye-laws of the hospital may be taken as a contemporaneous exposition of the charter; and contemporanea expositio fortissima est (1). The usage also is in favour of the construction contended for by the appellant. Contemporaneous exposition and usage have been resorted to even to extend the words of a grant from the Crown beyond their natural import; as in The Mayor of London v. Long (2); to ascertain the meaning and effect of a charter: The Governors of Luton School v. Scarlett (3); \*and in various other instances: The Mayor of Hull v. Horner (4); Rex v. Varlo (5). The importance of usage for such purposes is much insisted on by Buller, J. in Blankley v. Winstanley (6). these parties take, as, it is submitted, they do, an estate during good behaviour, it is equivalent to an estate for life. In Cruise's Digest, Offices (7) it is said, "If an office be granted to a person quandiu se bene gesserit, the grantee has an estate for life; for as nothing but misconduct can determine his interest, no one can prefix a shorter time than life; since it must be by his own act, which the law will not presume, that his estate can determine."

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[ \*42 ]

# Byles, Serjt. for the respondent:

It is to be observed that the present claim is not in respect of any particular room occupied by each inmate. It is not necessary to inquire whether, if there existed any tenancy for life in this case, it would constitute a freehold within the statutes of 8 Hen. VI. c. 7, and 10 Hen. VI. c. 2. But it is sufficient to argue that these parties have not a tenancy for life. The legal fee simple is in a corporation aggregate, of which these parties are members; and they are therefore not entitled to vote.

# Maunsell was then called upon to reply:

The corporation are merely trustees for the inmates. The latter are in the position of masters of a school, or dissenting ministers appointed by trustees (8); and by the seventy-fourth section of the 6 & 7 Vict. c. 18, trustees have no right to vote.

- (1) Vide 1 Shower, 535.
- (2) 10 B. R. 618 (1 Camp. 22).
- (3) 2 Y. & J. 330.
- (4) Cowp. 102.

- (5) Ib. 248.
- (6) 1 R. R. 704 (3 T. R. 279).
- (7) Sect. 27.
- (8) Vide post, 668-9, n.

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[ \*43 ]

Byles, Serjt. was called upon in continuation:

The inmates have not an estate for life. They may be removed \*by the governors whenever it shall seem convenient to them. They hold their situations upon the same tenure as the King's Judges did before the Revolution, who were appointed durante bene placito nostro. It appears from the bye-laws that the inmates may be expelled for such causes as idleness or marriage; which latter example, at least, shows that the appointment was not during good behaviour.

Maunsell, in reply:

At any rate, this is an interest of uncertain duration, and consequently it constitutes a tenancy for life. This rule is laid down as collected from the ancient authorities, in a note to Wynne v. Wynne (1); and is also to be found in Co. Litt. 42 a. The parties here had certainly each a tenement, as the case finds that each inmate has a house and garden to himself.

(Byles, Serjt.: They do not claim in respect of house and garden, but in respect of the emoluments.)

The real question is, whether each of them has an interest for life to the extent of 40s. a year. They have vested rights, which the Court will not lightly disturb. He also referred to Wilkinson v. Malin (2).

TINDAL, Ch. J.:

[ \*44 ]

It appears to me that the parties upon whose behalf this appeal has been preferred did not take a freehold estate. The patent of incorporation contains a power conferred upon the governors to nominate whom they may think proper as inmates of the hospital, and also a power to remove such inmates, which is given in the most general terms—"So often as it shall seem to be convenient to them or the greater number of them." I can scarcely conceive words of more general import than these, or conferring a wider exercise of discretion. I do not at all dissent from the \*statement as a general proposition, that the bye-laws of a corporation may be taken as an exposition of their charter. But the bye-laws here give the power to remove in very general terms—the governors are empowered to remove the inmates "for any

(1) 2 Man. & G. 19; see post, (2) 37 B. B. 791 (2 Tyr. 544; 2 Cr. p. 606, n.

offence or other lawful or reasonable cause." One can easily conceive a reasonable cause for removal without any offence having been committed by the party, as in the case of one of the inmates becoming suddenly rich (1). Upon the whole, I am of opinion that these parties did not take a freehold estate, and that the decision of the Revising Barrister must be affirmed.

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#### COLTMAN. J.:

I am of the same opinion. If the terms of the charter had been different; if the words had been, that the inmates might be removed by the governors "as often as convenient," the case might have been open to Mr. Maunsell's argument; but the words are, "so often as it shall seem to be convenient to them;" and this, I think, clearly gives the trustees a discretionary power of removing the inmates.

#### MAULE, J.:

The question in this case, whether these parties took an estate for life, depends upon the nature of the interest taken by them under their appointment by the governors. The power both of appointment, and of removal, is given by the charter. the term conveniens, there used, meant the same in the time \*of Queen Elizabeth as it meant in that of Augustus Cæsar, and as it now means in the time of Queen Victoria. The meaning of the expression is, that the governors may remove an inmate as often as it seems fit to them. An appointment of this kind never confers a right, but the party is always subject to removal at the arbitrary discretion of those by whom he was appointed. this is the meaning of this charter is evident from the bye-laws; otherwise marriage need not have been mentioned as a cause of removal. This is not like those cases where there are effectual words giving an estate, with a clause of forfeiture: here, the estate is limited, in effect, to the thinking fit of the governors.

[ \*45 ]

# ERLE, J.:

Without discussing the question whether the property here was

(1) If the patent had declared, in terms, that the interest of the inmate should cease upon his becoming rich, this would not, it would seem, have affected the question of freehold any more than in the ordinary case in the books, where an annuity is made determinable upon the grantee's being promoted to a benefice. There appears to be no substantial difference between the breach of a condition in law—such as to behave well,—and a condition in fact,—not to become rich, or not to obtain a benefice.

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[ \*46, %. ]

sufficient, I think the Revising Barrister was right in his decision. A power is given by the charter to appoint inmates for so long as the governors may think fit. An appointment so made—and the appointments in this case must be taken as if made in these terms—does not confer an estate for life, defeasible on a particular event. The bye-laws do not, and, indeed, could not, restrict the powers of the trustees in this particular. They only point out certain instances in which their discretionary power of removal should be exercised.

Decision affirmed (1).

(1) This judgment of affirmance, in effect, asserts that the terms of the letters patent confer an absolute power on the governors to remove at pleasure, and that such a power is inconsistent with the existence of a freehold interest in the appointee.† As to the former of these propositions, vide supra, p. 662, n. (1). As to the latter, see the long and unbroken series of decisions collected, 2 Man. & G., p. 19, nearly all of which appear to be tacitly over-ruled by the judgment in the principal case.

Lord Coke says, "If a man grant an estate to a woman dum sola fuerit, or durante viduitate, or quamdiu se bene gesserit, or to a man and a woman during the coverture, or as long as the grantee dwell \*in such a house," (though the power of living there may depend upon the will of a third party or even of the grantor,) "or so long as he pay 101., &c., or until the grantee be promoted to a benefice, or for any like uncertain time; in all these cases, if it be of lands or tenements, the lessee has, in judgment of law, an estate for life, determinable, if livery be made; and if it be rents, advowsons, or any other things that lie in grant, he has a like estate for life by the delivery of the deed; and in pleading, he shall allege the lease, and conclude, that by force thereof, he was seised generally for the term of his life" (Co. Litt. 42 a); and see T. 37 Hen. VI. fo. 26, pl. 1, Littleton, sect. 381; Down v. Hopkins, 1 where it is said,

that in Waste the writ shall be general -in terris quas tenet ad terminum vita, and the count special, showing the condition annexed to the estate. Upon which Mr. Preston observes, "A limitation for such an indefinite period passes an estate for life, because the estate may continue to the end of that period, and is certainly circumscribed by it": Preston, Estates, 405. In the case of equitable interests, the legal seisin of the trustee, whether acquired by livery or otherwise, creates the equitable seisin of cestui que trust. In Burton v. Burton, § it is said, that if A. grant to B., that as soon as A. comes to his manor of T., B. shall have fuel or such litter as A. shall make. though it rests in A.'s will whether he will come to T. or no; yet, if he do come, and disturbs B. from taking the fuel or litter, assise will lie, which would not be the case unless B. took a freehold interest under the grant. Where rent is granted generally, without saying for how long a freehold passes: Vavisor's case. || Lord Coke goes on thus: "A man may have an estate for term of life determinable at will. As if the King doth grant an office to one at will, and grant a rent to him for the exercise of his office for the term of his life, this is determinable upon the determination of his office." BRUDNELL, Ch. J., speaking in the early part of the reign of Hen. VIII., says, "A lease at will must be at the will of both parties; for, if it be at the

<sup>†</sup> See per WILLES, J. in Fernie v. Scott (1871) L. B. 7 C. P. 202, 209; 41 L. J. C. P. 20.—J. G. P.

<sup>† 4</sup> Co. Rep. 30.

<sup>§</sup> Lib. Ass. anno 17, fo. 49, pl. 7.

<sup>||</sup> Lib. Ass. anno 11, fo. 29, pl. 8.

## SIMPSON v. WILKINSON.

(7 Man. & G. 50-65; S. C. 8 Scott, N. R. 814; 14 L. J. C. P. 49; 8 Jur. 1126.)

By the 39 Eliz. c. 5, hospitals for the poor might be incorporated. Previously to that Act they could be founded by Royal licence or letters Northampton, patent. Before the Act, A. founded a hospital for certain "bedesmen," and made rules for its regulation. The bedesmen were appointed for life.

Held, that the hospital might be presumed to have been founded by licence; and therefore that the bedesmen were entitled to be registered as freeholders (1).

The Court will not allow any objections to be taken upon the argument of the appeal, which are not raised in the case stated by the Revising Barrister.

JOHN DAUNTLEY SIMPSON, of Peterborough, in the county of Northampton, on the register of voters for the northern division of

(1) See the last case and Heartley v. Banks (1859) 5 C. B. (N. S.) 40, 28 I. J. C. P. 144; Freeman v. Gainsford (1861) 11 C. B. (N. S.) 68, 31 L. J. C. P. 33; Roberts v. Percival (1864) 18 C. B. (N. S.) 36, 34 L. J. C. P. 84; Fryer v. Bodenham (1869) L. R. 4 C. P. 529, 38 L. J. C. P. 185.—J. G. P.

will of the lessor only, it is a lease for life": M. 14 Hen. VIII. fo. 14. Now, if a condition, that the interest of the lessee shall be determinable by an act depending upon the will of the lessor, does not destroy the freehold quality of that interest, still less will it be affected by a condition for determining the estate at the will of third persons, not parties to the grant: Hen. VII. fo. 38, pl. 47, M. 14 Hen. VIII. fo. 13, 14.

"If I make a lease to another till I go to Westminster, the lessee has an estate for life. So, if A. lease to B. till A. makes J. S. bailiff of his manor, B. has the freehold in him; for, since there is no particular time specified, but it is left indefinitely, when I shall go to Westminster, or J. S. shall be made bailiff of the \*manor, and these contingencies may or may not happen during the life of the lessee, and the livery transfers the freehold to him, so he must, consequently, by the words of the gift, enjoy it during his life, if none of these contingencies happen in that time upon which his estate is to determine." And see 1 Roll. Abr. 8441, Bac. Abr. tit. Estate for Life (A.), Dyer, 300 b, pl. 39, 10 Vin. Abr. 288, pl. 2, 4, Ib. 289, pl. 13, 2 Bl. Comm. 121, Hargrave's note to Co. Litt. 42, No. 245, Brewer v. Hill,† Hewlins v. Shippam.

So, an estate devised to a man exiled from Holland, for so long as he shall remain absent from Holland, is an estate for life: Paget v. Dr. Vossius; § and see Allen v. Hill, || Com. Dig. tit. Estate (E. 1). So, if I grant an annuity to A. for so long a time as he is kind, obliging, and friendly to me, A. has a freehold in the annuity: M. 7 Edw. IV. fo. 16, pl. 10. If I enfeoff A., upon condition that he reenfeoff B. within ten years, A. is seised in fee during the ten years, and continues afterwards to be seised in fee until I enter for a breach of the condition: Abrahal v. Brokesby.

Lord Coke says, that the law is the same as to the declaration of a use, with respect to the quantity of estate which passes; in confirmation of which, Mr. Hargrave cites, from Lord Hale's MSS., a dictum of Shelly, J. in 21 Hen. VIII. (which was before

1844. Not. 21.

County of Division. [ 50 ]

[ \*47, %. ]

<sup>† 2</sup> Anst 413.

<sup>‡ 31</sup> R. R. 757 (5 B. & C. 221).

<sup>§ 1</sup> Vent, 325; 2 Lev, 191; Sir T,

Jones, 73; 2 Mod. 223; 3 Keble, 749. || Cro. Eliz. 238.

<sup>¶</sup> E. 19 Hen. VI. fo, 67, pl. 14,

Simpson r. Wilkinson. the said county, for the parish of Castor, duly objected to the name of Henry Allen being retained on the register of voters for the said division.

the Statute of Uses, and when, therefore, uses stood nearly upon the same footing as trusts at the present time): Co. Litt. 42, note 10.

"A lease expressed to be determinable at the will of the lessor only, cannot, however, take effect as a conditional lease for life, unless the forms prescribed for the passing of a freehold interest be observed, as livery of seisin," &c.: per BRIAN, Ch. J. of Common Pleas, M. 20 Edw. IV. fo. 9, Thus, of corporeal hereditaments (which are said to lie in livery), if no livery be made, the grantee takes only at will: 2 Mary, Bro. Abr. tit. Lease, pl. 67, Sir W. Cordell's case. So, where A. leases to B., to hold at the will of B. the lessee, if there be livery of seisin, B. has an estate of freehold for life upon condition: T. 35 Hen. VI. fo. 63, pl. 3, 10 Vin. Abr. In the absence of livery, or of that which is tantamount to livery (or in the case of a trust, in the absence of a legal freehold in the trustee), the lessee has only an estate at will; and the tenancy, whatever be the language used in creating the demise, will be at the will of both parties: Co. Litt. 56 a. If A. leases his land "until his debts are paid," the lessee has only an estate at will, unless livery of seisin be made; with livery, he has an estate of freehold; (viz., an estate for life, determinable on the payment of the debts): per Lord Coke, Ch. J., 3 Bulst. 300; 3 Leon. 157; Shepp. \*Touchst. 270; 10 Vin. Abr. 296. Where the freehold claimed is equitable, the seisin of the trustees countervails the livery of seisin, &c., required when a legal freehold is to be established.

In 1522, we find the law respecting freehold interests thus laid down by BROOKE, Justice of C.P.: "If I let lands to one till he be promoted to a benefice; now, if he has livery, he has an estate

for life upon condition (i.e. subject to the condition that the life estate shall cease upon the promotion being obtained). So, of a lease to husband and wife during the coverture. For these estates may be made to depend upon such conditions as have a human determination (i.e. liable to be determined or put an end to by the occurrence of some event in which man is either agent or patient), but upon no other condition; for a lease to endure so long as such a tree grows (as had been suggested by counsel in argument), is but at will; because it is not natural (i.e. according to the known and established rule of tenure) for an estate to depend upon such like things": M. 14 Hen. VIII. fo. 13 a. That the law was also the same before the passing of the 8 Hen. VI. c. 7, which required a 40s. freehold qualification, is evident from Bracton, who, writing in the latter end of the thirteenth century, says, that a man holds, as freehold, that which is granted to him for life or indefinitely, and without any mention of time; as if it be granted until some specific thing be done. "Et sciendum quod liberum tenementum est, id quod quis tenet sibi et hæredibus suis, in feodo et hæreditate" (that is, in fee by descent); "vel in feodo tantúm, sibi et hæredibus suis" (that is, in fee, by purchase); "item, ut liberum tenementum, sicut ad vitam tantúm, vel eodem modo ad tempus indeterminatum absque aliqua certà temporis præfinitione, scilicet, donec quid fiat vel non fiat; ut si dicatur, Do tali donec ei providero." So, again in 1329, where land was demised to A. hubendum, whilst he paid twelve marks yearly to B., it was held that A. had freehold in the land so demised, and that B. had freehold in the rent reserved, by reason of the uncertainty. And it was compared to the case of land being given until the donor should

[ \*48, n. ]

The name and description of the said Henry Allen, on the said register for the said division, is, as follows:

Simpson v. Wilkinson.

Name.	Place of Abode.	Nature of Qualification.	St. Martin's Parish.
Henry Allen.	Lord Burghley's Hospital, St. Martin's, Stamford Baron.	Freehold tenement, or room.	Henry Allen, occupier.

He also duly objected to the names of twelve other persons whose qualifications, on the list of voters, were described in like manner, and depended upon the same facts.

return from a pilgrimage: Lib. Ass. anno 3, fo. 5, pl. 9. And see Havergill v. Hare†; 3 Edw. III. fo. 15, pl. 16; Littleton, s. 350; Co. Litt. 214 b, 218 a. The bailment of a horse to A., to ride, "until A. shall have finished his businesses," passes an estate in the horse for the life of A., by reason of the uncertainty, although a personal chattel: H. 17 Edw. IV. fo. 8, pl. 5.

Upon any inquiry into the nature of the equitable interest of a party, in property held by trustees for his benefit, it may be proper to consider what conveyance it would be necessary for the trustees to execute in order to divest themselves of all legal interest in the property, for the period during which it is to be enjoyed beneficially by cestui que trust. 'Thus, if land is held by A. in fee, upon trust, to pay the rents and profits to B., for so long time as B. shall teach at such a school, or say mass at such a chapel, or preach at such a meeting-house, or hold the appointment of bedesman in such a hospital, the proper course would seem to be, for A. to convey to B. or to some other person, an estate for the life of B., determinable upon his ceasing to officiate as schoolmaster, priest, or minister, or to hold the appointment of bedesman.

It would appear to make no difference, either in the form or in the substance of the conveyance of the legal estate, if the office or appointment was determinable at the mere will of a third party; as at the will of a patron, a Bishop, or a congregation, or of any other individual or body of men, or even at the mere will of A. the trustee.

Where A. is seised of lands or tenements for such an estate of freehold, customary or leasehold tenure as would have conferred the right of voting on him if he had been beneficially interested, but which he holds subject to a trust under which the rents and profits, or a sufficient portion of such rents and profits to constitute the amount required with reference to the particular elective franchise, are to be paid, or a beneficial occupation is to be allowed, for an indefinite period, the cestui que trust would appear to be entitled to vote. So, if A. were possessed of lands or tenements, for a term of 1,000 years, as trustee, the interest of his cestui que trust would, if indefinite, (and therefore, in contemplation of law, co-extensive with the term itself,) appear to be sufficient to confer the elective franchise on such cestui que trust, as a leaseholder within the 2 Will. IV. c. 45, s. 20.

The nature of the qualification of Davis, the principal, is properly described in the overseers' list, and nothing which amounts to a sustainable objection, is to be found in the fourth column. But with respect to Burbridge and his co-inmates, the

[ \*49, n. ]

<sup>&</sup>lt;sup>+</sup> Cro. Jac. 510; Popham, 126, 147.

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[ \*51 ]

Henry Allen was appointed by the Marquess of Exeter, to be one of the bedesmen of the hospital hereinafter described, in the room of William Benson, deceased.

The following is a copy of the appointment, duly stamped: "Be it known that I, the most honourable Brownlow, Marquess and Earl of Exeter and Baron of \*Burghley, have nominated and appointed, and, by these presents, do nominate and appoint, Henry Allen, of Stamford, in the county of Lincoln, to be one of the brethren of the hospital in St. Martin's, Stamford Baron, in the county of Northampton, in the room and place of William Benson, lately deceased. And I do hereby require and direct that the said Henry Allen be accordingly admitted into the brotherhood of the said hospital, and have, receive, and enjoy, all the benefits, profits, advantages, as one of the brethren thereof, he ought to have and enjoy. Given under my hand, this 22nd day of May, 1834.

(Signed) "EXETER."

In the parish of St. Martin's, Stamford Baron, is a freehold building called by the name of "Burleigh Hospital," or occasionally "St. Martin's Hospital," which is divided into several rooms, each of which is respectively inhabited by a bedesman appointed under the rules hereinafter mentioned, and by which the hospital is governed. Each bedesman keeps the key of his room; and the successor of each deceased bedesman occupies the same room as did his predecessor. These rooms are on the ground floor. The upper story of the building extends over all the said rooms, and is let as a granary, by the warden and bedesmen, at an entire rent, which they divide amongst themselves equally. Each room occupied, is of the annual value of 4l., independently of the rent received for the granary. The hospital is not rated to any parochial rates, nor are any of the bedesmen rated in respect of their rooms. Henry Allen was duly qualified for admission according to the rules and ordinances by which the hospital is governed, a copy whereof is hereunto annexed, and is to be taken as part of this case.

claim appears to be insufficient in a point not amendable, or, at least, not amended. The entry is, "Freehold appointment, as inmate of Jesus Hospital." Supposing the interest of the appointees to be freeholds, still, unless the appointment conferred the right to the possession, or to the perception of the rents and profits, of lands, or tenements, they would have

no right to be registered; and if the appointment did confer such right, it would be the lands, or tenements. which constituted "the nature of the qualification," and not "the freehold appointment." The qualification of a freeholder is the land or tenement of which he is seised, not the conveyance by which that land, or tenement, is held.

person appointed and admitted as a bedesman, has ever been known to be removed during his life. No deed, \*of any description, can WILKINSON. be found relating to the hospital. All the proper offices, and places of deposit, have been searched, and no trace of any original rules and ordinances, or of any charter, deed, or other documents, relating thereto, has been discovered; neither does any enrolment under the 39 Eliz. c. 5, exist, or any letters patent. The rules refer to certain "feoffees and their heirs;" but none are known. It was proved that the hospital was governed strictly by the printed unsigned copy of the rules and ordinances, which were produced from the hospital, where they are usually hung up in the common dining-room. There is no trace of any common seal, neither does there appear to be any record of the warden and brethren suing, or being sued, in any corporate name, or of any bye-laws made by them; nor have they ever been summoned on juries. The foreman, according to the ordinances, is called the warden of the almshouse of Lord Burleigh, and the other twelve, the almsmen or bedesmen. The sum of 2l. 14s. weekly is paid by the steward of the Marquess of Exeter, out of the rents of Cliffe Parks, to the warden of the hospital, for himself and the bedesmen. The Marquess of Exeter is the heir male of the body of Sir William Cecil in the copy of the ordinances mentioned and the owner of his house, and is lord of Burghley; and he has recently repaired the hospital at his own expense.

It was contended on the part of the objector—

1st. That if the claimants had any freehold estate, they had such estate only as members of a corporation aggregate.

2nd. That they had no freehold estate at all.

3rd. That, even if they had any freehold estate, it was an estate in joint-tenancy in the hospital, and not a separate and exclusive estate in each room; and that the claims, therefore, were bad.

I overruled these several objections, and retained the name of the said Henry Allen, and also the names of the said twelve other persons respectively, on the list of voters for the said parish of St. Martin's. Stamford Baron, being of opinion that, under the circumstances, a legal foundation might be presumed, not necessarily investing the claimants with a corporate character, and that they were respectively entitled to a separate freehold estate in their respective rooms.

> (Signed) J. M., Revising Barrister.

(The cases were consolidated.)

SIMPSON Γ \*52 T

[ 53 ]

Simpson v. Wilkinson.

- "Ordinances made by Sir William Cecil, Knight of the Order of the Garter, Baron of Burghley, for the order and government of thirteen poor men, (whereof one to be the warden,) of the hospital of Stamford Baron, in the county of Northampton, to remain in a chest in a chamber in the said hospital, locked up with two several locks, the keys whereof to remain in the custody of the vicar of St. Martin's and the bailiff of the manor.
- "Vicesimo Augusti, anno tricesimo-nono Eliz. Reg. et anno Dom. 1597."
- "1. The first five shall be named, chosen, and admitted by me, William, Lord Burghley, during my life, and after, by my heir male that shall be owner of my house and Lord of Burghley, whereof the foremost shall be called the warden of the almshouse of the Lord Burghley.
- "2. The next four, that is, the 6th, 7th, 8th, and 9th shall be named and admitted by the vicar of St. Martin's, for the time being, the bailiff of the manor of Stamford Baron, in the county of Northampton, and the eldest churchwarden of St. Martin's, and by them that shall be in the Nunnery, otherwise called St. Michael's, and in the inn called the 'George,' in Stamford Baron, or the greater number of them.

[ \*54 ]

- "3. The last four (viz.), 10th, 11th, 12th, and 18th \*shall be named and admitted by him that shall be for the time alderman of the borough of Stamford, in the county of Lincoln, and by the recorder of that town, the steward and bailiff of the said manor of Stamford, or the major part of them, whereof the alderman to be one.
- "4. Item. The vicar of St. Martin's, or the curate of the church, for the time being, shall keep a register in writing of the names and surnames of all the said poor men, which book shall be kept in the vestry within the chancel of St. Martin's church, and shall be written in order, beginning with the name of the warden, and then of the first four, and following, the second four, and lastly, the last four, and shall be signed with the hands of the bailiff of the manor of Stamford Baron, and of the steward of that manor; and so yearly renewed, as cause shall require, upon the decease or change of any of the said poor men; and a duplicate of this book shall be delivered to the alderman of Stamford, to be kept with the records of the town, thereby to know how the numbers shall continue.
- "5. When the warden and any other of the twelve shall die, or any of their places become void, the place of such as shall die or

become void, being the warden or one of the number of the first four, shall be supplied by the Lord of Burghley for the time being; WILKINGON and so the place of any of the second four dying or becoming void shall be supplied by the aforesaid vicar, and the parties authorised to name the second company of four; and the like shall be observed by the alderman of Stamford, and the others joined with him, for supplying the places of the last four as shall from time to become void [sic].

BIMPSON

" 6. Item. If the parties before named, or the major part of them, shall not supply the void places of such as have been first chosen by them, within twenty-eight days after the same shall be void, the same shall be supplied \*by any two others of them that are authorised to nominate any of the said twelve; and in default of such nomination the Lord of the house of Burghley and his heirs male shall supply the same within two months; and in default thereof, some one or two of the feoffees or their heirs, to whom the annuity of 100l. is granted, that shall dwell near Burghley, shall supply the same.

[ \*55 ]

- "7. Item. The warden of the house shall have yearly a gown cloth of three yards, and of 8s. per yard, and every of the other shall have every year a gown cloth of three yards at 6s. 8d. the yard. of such colour as the livery coats of the Lord Burghley, or his heirs shall be for the time, which shall be provided and bought by the bailiff of the manor of Stamford Baron, and by the oversight of the vicar of St. Martin's and the alderman of Stamford.
- "8. Item. In the nomination of the said warden and twelve poor men, these circumstances following shall be observed, or else none otherwise named shall be allowed:
- "9. First. Every one so to be named shall be presented in the church of St. Martin's upon a Sunday in the forenoon, to the vicar of the said church, and by him to be allowed to be of honest Christian profession, and able, and well disposed, to say the Lord's Prayer, the Creed, and to learn to answer to the Ten Commandments, as are prescribed to such as are catechised.
- "10. Item. None shall be admitted thereto but such as shall have been born in the counties of Northampton, Lincoln, or Rutland, or that have dwelt for the space of seven years within seven miles of the borough of Stamford, except the Lord of Burghley shall, for some reasonable cause, dispense therewith; neither shall any be thereto allowed that are under thirty years of age, or that hath any certainty of living above the value of 58s. 4d. by the year; nor any

Simpson v. Wilkinson. [\*56] that is known to be \*diseased of any leprosy, or the pox called the French pox; nor any drunkard, barrator, or infamous for adultery; these, and such like, faults.

- "11. Item. The said poor men shall and may, as near as may be, be chosen out of such as have been either honest soldiers, or workmen, as masons, carpenters, or other artisans of handicraft, or labourers in any work, or in husbandry, or servants that are by sickness or any other impediment unable to get their livings by their hand-work, or by daily service, as beforetime they have done; and if, after they shall be chosen to the places, any of them shall fall into such infirmities or infectious diseases, or be justly infamed and convinced of such notable vices as above in the next former article mentioned, they shall be displaced by them by whose authority they were placed, and their allowance to cease within fourteen days after their displacing; against which time their places shall be supplied by such as have displaced them.
- "12. Item. None of the said thirteen poor men shall, in any alchouse or other places, play at cards, dice, or any other unlawful game; but if, after, on a warning given to them by the vicar of St. Martin's, or of the bailiffs of Stamford Baron, or of the manor of the borough of Stamford to forbear from such unlawful play, they shall be, the second time, committing such offence prohibited, he shall be removed from his place, and shall receive no more weekly relief; except, he acknowledging his fault, and promising of amendment, he shall be restored by the said vicar and bailiff and two other of the number that first placed him.
- "13. Item. Every of these poor men shall resort, in their livery gowns, to the Common Prayers, every Sunday, Wednesday, and Fridays and holydays, to St. Martin's church, at morning and evening prayers, and shall sit and kneel in some convenient place, appointed \*by the churchwardens; neither shall any of them be absent from the church at such times, without just cause, by sickness, to be notified to the vicar, and to be allowed by him; and for every such fault not excusable, the parish clerk shall have 6d. out his week's wages allowed him by the poor man that shall make such default.
- "14. Item. There shall be paid to the said warden, and to the other twelve, by the vicar of St. Martin's, and the bailiff of the manor, in St. Martin's church, or by one of them, every Sunday after evening prayer these sums following; viz. to the warden of the hospital the sum of Ss. for the week following, and to every of

[ \*57 ]

the other twelve the sum of 2s. 4d. for the week following; saving to the parish clerk his due for the defaults before committed, if any WILKINSON. shall be as is above expressed; which he shall also receive at the same time.

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"15. Item. All the poor men that shall be unmarried and not interclusive sick, shall lodge every night in the common house, without some special impediment to be allowed by the vicar, or by the bailiff of the manor of Stamford Baron; and such as shall be married may live with their wives out of the common house, so as the same be within the parish of St. Martin's, or within the borough of Stamford; but yet they shall be bound, one night in a month, to lodge with their fellows in the common house, upon pain of the loss of one week's wages, which shall be paid to the poor men's box in St. Martin's church.

"16. Item. None of these shall go abroad in their gowns out of the bounds of St. Martin's parish, or out of the borough of Stamford and the liberties thereof.

The vicar of St. Martin's or the minister shall, upon " 17. Item. the first Sunday of every quarter of the year, assemble them together in the church before evening prayer, and, severing them asunder, hear them the Lord's Prayer, the Creed, and to answer to the Commandments; \*and such as will not, in convenient time, learn and be able to say the same, shall be avoided from his room after fourteen days' space given him to learn the same; and the vicar or minister shall have, for his labour, five shillings every such Sunday, and the parish clerk, twelve pence, for attending upon the vicar.

"18. Item. They shall, every first Sunday of every quarter, go to Burghley House, if the Lord Burghley, or the lady his wife, shall there keep household, and there shall dine at one table together in the hall, where they shall have two messes of meat; every mess of two dishes, one of pottage and boiled meat, and the other of roast, if it be not fasting day; and if it be fish day they shall have two like messes of white meat and fish; for the charge whereof he that shall dwell at Burghley, as the heir of the house, shall defray the same; or else in case of the absence of the said Lord Burghley, or the lady his wife, from the house, payment shall be made out of the yearly sum of the annuity, to the said thirteen poor men, after the rate of four pence a piece, to be paid by the bailiff of the manor, or by such as shall be authorised to receive the annuity, and to distribute it according to these orders; and the same to be allowed upon the accompts.

[ \*58 ]

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[ \*59 ]

- "19. Item. If, at any time, he that shall be mine heir of my house at Theobalds, in Hertfordshire, shall come to Burghley or Stamford, the said poor men shall present themselves dutifully unto him, and shall offer any service they can do to him, in memory of the founder, William, Lord Burghley, ancestor of the said owner of Theobalds.
- "20. Item. If any doubt or question shall arise upon the words or meaning of these former articles or ordinances, the resolution or determination thereof shall be made, and in writing delivered to the vicar of St. Martin's, by the Bishop of Peterborough, or by the dean and \*any one prebendary, of the church of Peterborough; whereunto all parties shall yield and obey.
- "21. Item. As these poor men shall have at the first, their several rooms allowed them in the almshouse, so shall they, during their lives or their continuance in their places, continue their lodging, and every one as he shall succeed to the void places, so shall he succeed in the lodgings, without any change.
- "22. Item. All the twelve shall, at their entries, openly, in St. Martin's church, promise to be obedient to the warden of the house in all things that he shall advise them for the observation of the orders of these articles prescribed; and if any of them shall wilfully refuse to observe the same, he shall complain thereof to the Lord Burghley for the time being, or in his absence, to the vicar and bailiff of the manor, who shall remove such a wilful person from the place whereunto they did first name him, and shall appoint another.
- "23. Item. During the life of me, the Lord Burghley, he that shall be my bailiff of the manor of Stamford Baron, shall receive the said annuity of 100l. out of my lands heretofore called Cliff Park, in the county of Northampton, and, with the privity of the said alderman of Stamford, or the vicar of St. Martin's, make payments thereof according to these orders; and the rest that shall remain upon his yearly accounts, to be employed upon the repairs of the house, or upon the poor prisoners in any gaol in the borough of Stamford, by the appointment of the said alderman, vicar, or recorder of Stamford, for the time being, before whom the said bailiff shall make yearly his accompts, the 2nd day of November; and, after my decease, if the said alderman, vicar, and recorder of Stamford, for the time being, shall not like to continue the said bailiff for the said service, they shall name and appoint either such as shall be bailiff of the borough of Stamford, or such as shall be

inhabitants in \*the inn or house called the 'George' of Stamford Baron, or in the site of Saint Michael's nunnery; or in default of them, such others as shall meet for that purpose, with the consent of the Lord Burghley, for the time being, or any two of the feoffees; which accompt shall be also yearly, after the last of November, presented to the Lord Burghley, if he shall be then residing at Burghley, or, in his absence from thence, to some one of his feoffees.

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[ \*60 ]

"24. Item. The said annuity shall be paid by the bailiff or farmers of Cliff, every quarter of the year, to the bailiff of the manor of Stamford Baron; (that is to say,) 25l. at or before the feast of St. Michael the Archangel, and so accordingly by even portions; of which said money the bailiff shall weekly make payment of the above said sums as afore is expressed; and now for the first payment he shall begin the first Sunday after the feast of St. Michael, and so continue weekly.

"25. Item. There shall also be provided by the said bailiff, by the privity and consent of the alderman of Stamford and the vicar of St. Martin's, gowns for every of them, according to the value above mentioned; which shall be delivered them yearly, the Monday after the 1st Sunday after Michaelmas.

"26. Item. There shall be also, during the term of twenty-one years from the feast of St. Michael, the Archangel, last past, yearly delivered out of the woods of Cliff Park, thirteen loads of fire-wood, for the said thirteen poor people abiding at the said hospital, by Roger Dale, gent., farmer, and tenant of Cliff Park, his executors or assigns; which said thirteen loads the said Roger Dale, his executors or assigns, are bound, by covenant, to cause yearly to be carried to the said hospital, at some convenient time before the feast of All Saints, and after the end of the said one and twenty years, the \*said quantity of wood shall be provided by the bailiff of the manor of Stamford Baron for the time being."

[ 61 ]

Byles, Serjt. for the appellant:

The first question in this case is, whether the bedesmen have any estate at all. It is submitted that they have not. \* \*

(Hildyard, for the respondent, stated that he should not contend they had a legal estate.)

Neither have they an equitable estate. \* \* \*

[The bedesmen are members of a corporation. The ordinances were made before the Act 39 Eliz. c. 5, came into force, and must

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[62]

have been founded by licence or letters patent;] and in that case it is a mere gratuitous act on the part of Lord Exeter to continue the charity; and consequently the bedesmen have no rights conferred upon them. If the hospital was founded after the statute, it must have been a corporation aggregate; and in that case the bedesmen, being members of such corporation, have no separate estate; so that either way they have no right to vote.

(Erle, J.: Is it any objection that a party has a defect in his title, and that the Crown might enter?)

[ \*63 ] That may be an answer so far as the question of illegality \*goes; but still the question remains, whether the estate was not vested in a corporation.

(COLTMAN, J.: If the estate was conveyed to trustees, there would be no offence against the Statute of Mortmain.

MAULE, J.: We may presume the Queen's licence, and we need not presume that the hospital was incorporated.)

Secondly, if they have any estate, they have not one for life. \* \* \*

There is another objection, that these parties are in receipt of alms.

(Hildyard: That objection was not taken before the Revising Barrister.)

It is nevertheless open to the appellant to show that the very estate claimed would operate as a disqualification under the 2 Will. IV. c. 45, s. 36 (1). It would be strange that the very fact that disqualifies should confer right of voting.

(Maule, J.: It may be said to be equally strange that the very estate that qualifies should act as a disqualification. Besides, there is nothing in the case to show any receipt of alms within twelve calendar months.

ERLE, J.: Was there ever a case in which an estate for life in [\*64] lands, was considered \*to be alms?

TINDAL, Ch. J.: There appear to have been three distinct

(1) That section relates to cities and boroughs only.

objections taken before the Revising Barrister, and none of them raise this point.)

Simpson v. Wilkinson.

## Hildyard, for the respondent:

The question before the Revising Barrister was, whether Lord Burghley, in founding this hospital, proceeded, under the statute 35 Eliz. c. 7, by way of feoffment, or whether the hospital was incorporated under the statute 39 Eliz. c. 5. The Barrister decided in favour of the former view of the case. But that was merely an inference of fact as to the effect of the evidence; which is a matter in respect of which there can be no appeal. [He was then stopped by the Court.]

#### TINDAL, Ch. J.:

It appears to me that the only question open to us in this case is, whether the Revising Barrister was wrong in law, in presuming a legal commencement to the estate in these bedesmen. I think his decision was right, and that the facts fairly warranted him to presume,—which was all that was necessary,—that the estate existed by virtue of the Queen's licence before the passing of the 39 Eliz. c. 5.

COLTMAN. J. concurred.

[ 65 ]

# MAULE, J.:

I am of the same opinion. The ordinances of 1597 were made, it appears, before the 89 Eliz. c. 5. In these ordinances "the feoffees" are mentioned. We may fairly presume that the hospital was endowed by a licence from the Crown. Lord Burghley, it is to be observed, would not have had much difficulty in getting such a licence. The only question in the case is, whether these bedesmen have an equitable estate (1). I think they have; as they are not liable to arbitrary amotion (2).

## ERLE, J. concurred.

- (1) The legal estate would be in the grantees of the rent-charge of 100l. per annum, called in the ordinances "feoffees," the term "feoffees" or "feoffees sur confidence," being that by which trustees were, at that period, usually designated whether their seisin was derived from a feoffment or from a grant.
- (2) Upon the question, whether the existence of an arbitrary power determining the interest will derogate from the freehold character of such interest as a legal life estate, see M. 20 Edw. IV. fo. 9, pl. 4, M. 14 Hen. VIII. fo. 14; Co. Litt. 42 a.

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Hildyard applied for costs.

WILKINSON.

#### MAULE, J.:

I think it is a case for costs, upon the ground that the successful party ought always to have his costs, unless there be some particular reason to prevent it.

#### Tindal, Ch. J.:

It seems to me that this was a reasonable case for argument, and therefore that costs ought not to be given.

COLTMAN and ERLE, JJ. concurred.

Decision affirmed, without costs.

1844. *Nov.* 21.

## GEORGE NUNN v. WILLIAM DENTON.

(7 Man. & G. 66-71; S. C. 8 Scott, N. R. 794; 14 L. J. C. P. 43; 8 Jur. 1102.)

Borovgh of Bury St. Edmunds. [66]

A building, the lower part of which is used as a cow-house and stable, and the upper part, consisting of a chamber, used as a dwelling-place, is properly described as a house, within the Representation of the People Act, 1832 (2 Will. IV. c. 45), s. 27 (1).

The COURT refused to allow an objection to be argued which had not been raised before the Revising Barrister.

THE respondent's name appeared in the list of persons entitled to vote in the election of members for the borough of Bury, in respect of the occupation of property in the parish of St. Mary, as follows:

Christian Name and Surname.	Place of Abode	Nature of Qualification.	Name of Street, &c.,   where situate.
William Denton.	Rushbrooke.	Building and land.	Haberden.

The respondent also duly claimed to be inserted in the said list, in respect of the occupation of the same property, as follows:

Christian Name and Suruame.	Place of Abode.  Nature of Qualification		Name of Street, &c., where situate.
William Denton.	Rushbrooke.	House and land.	Haberden.

The respondent, who was duly objected to in both cases by the

<sup>(1)</sup> Repealed, subject to certain reservations, by 48 Vict. c. 3, s. 12: but see 45 & 46 Vict. c. 50, s. 9 (2).

appellant, appeared in support of his claim to be retained, or to be inserted, in the said list.

NUNN U. DENTON.

At Michaelmas, 1838, the respondent and John Frederick Denton. Henry John Hasted, and John Thomas Ord, jointly hired a piece of pasture land in the said parish, for seven years, at a rent of 681. per annum. \*Shortly afterwards they erected a building on the said land at an expense of 45l.; the building was substantially built of brick and stone, with a tiled roof. The lower part consisted of a cowhouse and stable; over the stable was a chamber about twelve feet square, in which were a fireplace and window. There was a staircase from the stable to the chamber; and the only entrance to the building was by folding doors, opening into the cowhouse. The chamber was furnished with a bed and chairs by the respondent and his co-lessees. The pasture was used for taking in the cattle of persons in the neighbourhood to agist, at a certain price per head Some cattle belonging to the respondent were also agisted there. When the parties hired the land, they employed a person named Clarke to collect the money paid for agistment; and it was arranged between them that Clarke should find some person to reside in the building in question to keep the keys of the gate of the pasture, and look after the cattle, he, Clarke, residing too far off to do so himself. Clarke accordingly put his brother-in-law, Betts, into the building; he maintained Betts, but paid him no wages. Betts resided and slept in the chamber in the building, kept the key of the gate of the pasture, looked after the cattle, and occasionally received the agistment money. The lower part of the building was sometimes used by the cattle when ill; the cows were occasionally milked there; and the respondent and some of his co-lessees, put their horses in the stable. Each of the four lessees had a key to the doors of the building. The building was suitable for the purposes for which it was used; it was conveniently placed for the occupation of the pasture; and it was necessary that some person should reside on, or near to the gate of, the pasture, to look after the cattle, and to prevent the owners from taking them away without paying for the agistment. \*The building continued in the same state until December, 1843, when part of the stable was converted into a room having a fireplace, with a door opening into the pasture; and Betts continued to reside in the building, and the pasture was occupied, as before.

[ \*67 ]

[ \*68 ]

The respondent was duly qualified to vote for the said borough, subject to the questions hereinafter mentioned.

NUNN r. Denton.

[ \*69 ]

I expunged his name from the list of voters, in respect of the qualification "Building and land," on the ground that the building was a house, and should have been so described. And I inserted his name in respect of his qualification "House and land," as claimed by him.

If the Court are of opinion that the said building and land were not occupied by the respondent and his co-lessees, within the twenty-seventh section of the 2 Will. IV. c. 45, the register is to be amended by expunging the name of the respondent therefrom. If the Court are of opinion that the building and land were occupied by the respondent and his co-lessees, and that his qualification was properly described as "building and land," the register is to be amended by expunging the name of the respondent in respect of the qualification "house and land," and inserting his name as it originally stood on the list in respect of the qualification "building and land." If the Court are of opinion that the building and land were occupied by the respondent and his co-lessees, and that his qualification was properly described in his claim as "house and land:" the register is not to be amended.

The cases of Hasted and Ord were consolidated with the principal case.

(Signed) C. E., Revising Barrister.

# Manning, Serjt. for the appellant:

Three questions have been submitted by the Revising Barrister for the opinion of the Court; but he had no authority to submit \*any particular questions. The only question with which the Court has to deal is, whether the building mentioned in the case is to be considered as being a "building," within the meaning of the twenty-seventh section of the Reform Act, or whether it did not cease to exist as a building in December, 1843, and then become a "house." Under that section a party is required to occupy a house, or some building other than a house, for twelve months. The clause as to successive occupations (1) does not apply to this case; nor is there, indeed, any statement or claim in respect of successive occupation. The Court has decided that a substantial agricultural erection, held with land, is sufficient to confer the franchise; but that was because it came within the term "building:" it was not considered to be a "house."

(MAULE, J.: Are we not bound to presume, in favour of the decision, that every thing existed which should induce the Revising Barrister to hold as he has done, that the building in question was a house? Why should not a house consist of a chamber, and a cowhouse under it?

NUNN DENTOK.

TINDAL, Ch. J.: Was it not a house, if a man was put in for the purpose of sleeping there?)

There was no sufficient occupation to make it a house. The party put in was a mere agent to receive agistment money, not a domestic servant.

(MAULE, J.: Will not an occupation by a non-domestic servant be sufficient?)

It is submitted that it will not.

(Erle, J.: Are you not confounding residence with occupation?

TINDAL, Ch. J.: The occupation of the land was by agisting it, of the house, by putting a person in to receive the money. In the case of a mews or stable, with rooms above, the occupation of the servant would be that of the master.

COLTMAN, J.: If a man were put into a cottage as a \*shepherd, [ •70 ] would not that be an occupation?)

[71]

In the cases put the master could not be rated as occupier.

There remains another objection. The place of the voter's abode is entered in the notice of claim as Rushbrooke only, without stating where Rushbrooke is.

(MAULE, J.: Was that objection taken before the Revising Barrister?)

It is not necessary that that should appear upon the case.

Byles, Serjt. for the respondents, was not called upon.

TINDAL, Ch. J.:

I do not think it is open to the appellant to insist upon the latter There might have been evidence upon the subject given at the time before the Revising Barrister.

NUNN T. DENTON. As to the other point, I think that within the fair meaning of the Act this building was a house, where a party dwelt, as people usually dwell in a house, by sleeping there at night. The fact of cattle being placed in the lower part of the building, will not make it less a house. It is a very clear case.

The other Judges concurred.

Decision affirmed, with costs.

1845. Jan. 16.

City of Wostminster.

[ 85 ]

## SAMUEL PITTS v. FRANCIS SMEDLEY.

(7 Man. & G. 85-87; S. C. 14 L. J. C. P. 73.)

The occupier of part of a house, where the landlord resides upon the premises and retains the key of the outer door, is a mere lodger, and is not a person occupying "as owner or tenant" (1).

Where a case sent by the Revising Barrister, found that a claimant "stated" certain matters, it was remitted upon the ground that it set forth evidence and not facts (1).

Parish of Saint Mary-le-Strand. Case of Samuel Pitts, a claimant.

#### Notice of Claim.

Samuel Pitts.	17, Catherine Street, Strand.	Part of house.	17, Catherine Street, Strand.
1			

Charles Marshall is owner of a house and shop, No. 17, Catherine Street, Strand. He occupies the shop and first floor. He lets the other floors to several lodgers.

Samuel Pitts [states that he] (2) rents the second and third floors at a weekly rent, amounting to 26l. a year; [that] he has exclusive control over these rooms, and has the keys thereof in his possession; [that] he has also a latch key to the street door, by which he lets himself in at night; [that] there are other lodgers in the house, to some of whom the landlord gives latch \*keys; but he sometimes has young men as lodgers, and to these the landlord does not intrust latch keys; [that his] (these words were omitted

- [ \*86 ]
- (1) Cited in Bradley v. Baylis (1881) 8 Q. B. Div. 195 (see pp. 224 and 235); S. C. 51 L. J. Q. B. 183. See also Score v. Huggett, post, p. 691; Wansey v. Perkins (Hill's case), post, p. 692.

  —J. G. P.
- (2) When this case was called on in last Michaelmas Term, the LORD CHIEF JUSTICE observed that the case

stated evidence only, and not facts; and that it should be referred to the Revising Barrister to state facts only; and also to state whether or not the landlord resided in the house. The case was accordingly remitted to the Revising Barrister, and was amended by striking out the words in brackets and inserting those in italics.

in the amended case, and the words the claimant's inserted in lieu thereof) right of egress and ingress has never been interfered with by the landlord.

PITTS v. Smedley.

[That] there is another lock to the entrance door, but he has never seen the key to it; [that] when he has found the street door fastened, he has entered the house through Marshall's shop.

Pitts's name appears with Marshall's upon the rate made in November, 1843, and upon the subsequent rates. No rate was made between April, 1843, and November, 1843. Upon these facts, the point raised for my decision was, whether Samuel Pitts had such an exclusive occupation of the second and third floors of the house No. 17, Catherine Street as to confer the franchise.

On that point I decided in the negative.

(Signed) D. C. M., Revising Barrister.

Charles Marshall, the landlord, not only occupied the ground floor as a coffee shop, but also resided with his family on the premises.

(Signed) D. C. M.

Cockburn, for the appellant, contended that the claimant occupied a "building" within the meaning of the twenty-seventh section of the Reform Act (1).

Merewether, for the respondent, was not called upon.

[ 87 ]

## TINDAL, Ch. J.:

It appears to me that this case is free from all doubt. The question is, whether the claimant occupied any premises as "owner or tenant." It does not turn so much on the description of the premises as on the nature of the occupation. The landlord of the house gives only a limited enjoyment therein to the claimant. The door of the house has a lock to it, of which the claimant has not the key; his right of access therefore to the rooms in his occupation is merely permissive. It is not an occupation as owner or tenant. He is strictly an inmate or lodger.

The other Judges concurred.

Decision affirmed, with costs.

(1) See now 30 & 31 Vict. c. 102, s. 3; 48 & 49 Vict. c. 3, ss. 2 and 12.—J. G. P.

1845. Jan. 16. TOMS v. CUMING.

(7 Man. & G. 88-95; S. C. 14 L. J. C. P. 67.)

Borough of Totnes. [88]

A notice of objection, and also the duplicate notice, where notice of objection is sent by the post, must be personally signed by the objector.

HENRY Toms, of Fore Street, Totnes, on the list of voters for the parish of Totnes, in the borough of Totnes, objected to the name of Samuel Angel being retained on the list of persons entitled to vote in the election of members for the said borough.

The notice of objection had been signed by the objector himself, and a copy thereof had been signed with the name of the objector by one William Bernard Hannaford, by the direction of the objector, and in his presence, and both were addressed to Angel, at his place of abode, as described in the list. The notice and copy were examined by the objector, and were by him taken to the postmaster at Totnes on the 23rd day of August last, and compared and stamped by the postmaster. The notice was retained at the post-office to be forwarded according to the Act, and the copy was returned to the objector, who produced the same to me in Court. The notice would, in the ordinary course of post, have been delivered at Angel's place of abode as described in the list, on or before the 25th day of It was objected on the part of Angel, that the August last. production of such stamped copy was not the production of a duplicate notice, as required by the 6 & 7 Vict. c. 18, s. 100. And I being of that opinion, retained the name of the voter without proof of his qualification. (Twelve other cases were consolidated with the principal case.)

[ 89 ]

The question for the opinion of the Court is, whether the name of Samuel Angel was rightly retained in the list of voters.

If the Court are of that opinion, the register is to stand without amendment.

If the Court are of a contrary opinion, the register is to be amended by expunging therefrom the names of Samuel Angel and the other twelve.

(Signed) J. L. L., Revising Barrister.

Kinglake, Serjt., for the appellant:

The stamped copy of the notice of objection, produced before the Revising Barrister, although not signed by the objector himself, was a duplicate, within the meaning of the 100th section of the 6 & 7 Vict. c. 18, s. 100, inasmuch as it was signed by his

authority. The notice itself, sent by the post, was actually signed by him.

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(TINDAL, Ch. J.: The notice sent by the post may be called an original; the question is, whether the other copy may be called a duplicate.

CRESSWELL, J.: Was it not the intention of the statute that the copy retained should be identical with the one that is sent?)

The seventeenth section requires the notice of objection to be signed by the party objecting; that must mean the notice sent to the voter. It is sufficient if it be shown that the notice retained has been examined by the postmaster, and found to correspond with that which was sent. \* \*

(MAULE, J.: The seventeenth section does not say the signature must be in the objector's own handwriting. May he not sign by his agent?

ERLE, J.: Might not an attorney have \*signed both notices?)

[ \*90 ]

Prior to the passing of the Registration Act, an objector must have proved personal service of the notice, and that such notice had been duly signed: that Act has dispensed with the personal service, leaving the question as to the sufficiency of the signature untouched. The signature here is sufficient, upon the principle, qui facit per alium, facit per se. In Schneider v. Norris (1), a bill of parcels, in which the name of the vendor was printed, and that of the vendee written by the vendor, was held to be a sufficient memorandum within the Statute of Frauds (2) to charge the vendor.

(Tindal, Ch. J.: That was under the seventeenth section of the statute, which requires the memorandum to be "signed by the parties to be charged, or their agents." In another section (sect. 7) the statute speaks of a signature "by the party," without mentioning any agent.

CRESSWELL, J.: In Hyde v. Johnson (8), it was held that under the 9 Geo. IV. c. 14, s. 1, an acknowledgment, signed by the agent of the debtor, will not retrieve a debt barred by the Statute of Limitations; and that it must be signed by the debtor himself.)

- (1) 15 R. R. 250 (2 M. & S. 286).
- (3) 42 R. R. 737 (2 Bing. N. C. 776;

(2) 29 Car. II. c. 3.

3 Scott, 289).

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v.

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That case appears to be inconsistent with Schneider v. Norris.

Cockburn, for the respondent:

There is no inconsistency between the two cases. Schneider v. Norris was decided upon the seventeenth section of the Statute of Frauds, in which the signature by an agent is mentioned. Hyde v. Johnson turned upon the 9 Geo. IV. c. 14, which requires the acknowledgment to be signed "by the party chargeable thereby," nothing being said about an agent. The document produced before the Revising Barrister in this case was a copy, and not a duplicate.

[\*91] (MAULE, J.: It appears that the postmaster may select \*which of the two documents he will send. A duplicate means a document which is the same as another in all essential particulars.)

There is no provision in the Reform Act that the objector shall sign the notice of objection (1). Though the form of the notice, given in the schedules, ends by saying "(Signed) A. B. (place of abode)," doubts may have arisen as to what was a sufficient signature under that schedule, and the new Act shows the intention to have been that the notice should be actually signed by the person objecting.

Kinglake, Serjt., in reply:

In Kine v. Beaumont (2) it was held that the copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence without notice to produce the original letter; upon the ground, as stated by Burrough, J., that there is no substantial distinction between a duplicate original and a copy made at the time.

(Maule, J.: It would hardly be contended upon the authority of that case, that an examined copy of a bill of exchange drawn in duplicate, was the same thing as a duplicate (3). If the signature of the party is essential to the original notice, then the document in question was not the same in all essential particulars.)

In Hyde v. Johnson great stress is laid upon the fact—that an agent was mentioned in the original Statute of Limitations,

- (1) See 2 Will. IV. c. 45, s. 47.
- (2) 24 R. R. 678 (3 Brod. & B. 288; 7 Moore, 112).
- (3) Bills of exchange drawn in sets, are not usually called duplicates, or

bills drawn in duplicate; nor does either term seem to be strictly applicable; bills so drawn appearing rather to be in the nature of distinct alternative mandates. 21 Jac. I. c. 16, but was not mentioned in Lord Tenterden's Act, 9 Geo. IV. c. 14, which was a rider to the former statute. That \*argument does not apply to the present case. It is only necessary to prove the personal signature of the objector to the original notice which is sent to the party objected to.

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v.
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[ \*92 ]

(ERLE, J.: Is not the production of the stamped copy sufficient for that purpose?)

That is only to show that a notice has been sent; whether the notice is sufficient, is another question.

#### TINDAL, Ch. J.:

It appears to me that the Revising Barrister was right in his decision, that the notice of objection was not proved to have been given pursuant to the provisions of the 100th section of the 6 & 7 Vict. c. 18. The first question is, whether the original notice of objection should be signed by the objector himself. The seventeenth section of the Act says that, "Every person, so objecting, shall give, or cause to be left at the place of abode of the person objected to, a notice according to the form numbered (11) in the said schedule (B); and every notice of objection shall be signed by the person objecting." And the form given in that schedule commences with the words, "I hereby give you notice," &c., and concludes, "(Signed) A. B. of (place of abode), on the list of voters for the parish of ——" (1).

The natural meaning of these words is, that there shall be a personal signature. And there is great reason and good sense in such an enactment. If the objector were unknown, and was at liberty to get some one else to sign the notice, there might be great difficulty in obtaining costs from him. Some shuffling person might be put forward in his stead; and great inconvenience and vexation might be the result. The case of Hyde v. Johnson corroborates the propriety of this interpretation of the clause in question.

Then, if the original notice must be signed by the objector himself, it appears to me that the requisites of the 100th section have not been complied with. That \*section requires that "whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open, and in duplicate, to the postmaster," &c.; thus, apparently,

[ \*93 ]

<sup>(1)</sup> See now the Form in Sched. 3 of the Registration Order, 1895.—J. G. P. R.R.—VOL. LXVI. 44

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[ +94 ]

treating each document as an original. Then the postmaster is to "compare the said notice and the duplicate, and on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office." It is open, therefore, to the postmaster to send which notice he pleases. The very meaning of the term "duplicate" is, that one document resembles the other in all essentials. The instance put by my brother MAULE, in the course of the argument, of bills drawn in duplicate, is an apt illustration. In this case, one of the documents was a notice; but the other was no notice at all.

#### MAULE, J.:

I am of the same opinion. I think that the signature should be that of the party objecting; and that this is deducible both from the words of the seventeenth section and from the form given in the schedule there referred to. The form shows that the name and place of abode of the objector are to be at the bottom of the notice; and the provision at the end of the section, requiring every notice to be signed by the person objecting, is in addition to the requisition that his name shall be at the foot of the notice. This shows that it is the party himself who is to put his name there. "signing" means marking, in some way, by the party himself. Two things, therefore, appear clearly to be required—that the name of the objector be at the bottom of the notice—and that \*it be placed there by the party himself. The purport of the section is, that the party objected to may have some means of knowing that the objecting party did really object. Otherwise persons might be called upon to come up and defend their votes, and, after all, might find out that there was no real objector, but that the name of the supposed objector had been put to the notice without his authority.

The next question is, whether the duplicate, which is to be returned by the postmaster to the person who brings the notice, must be similarly signed. The term "duplicate" means a document which is essentially the same as some other instrument. It is a very different thing from an examined copy; although an examined copy may, in effect, be a duplicate under certain circumstances. But, in the present case, the copy is essentially different from the original.

I conceive that it was necessary to prove before the Revising Barrister the handwriting of the objector to both of the documents: and, such proof not having been given, that the Barrister was right in his decision.

Toms v. Cuming.

#### CRESSWELL, J.:

I am of the same opinion. The effect of the seventeenth section is, that the objecting party is to give a notice of objection, and that his name is to be subscribed thereto by himself. As to the duplicate, the objector is relieved from the proof of the ordinary service of the notice, by adopting the course prescribed by the 100th section; but he must show that the document sent by the post is identical with the one produced before the Barrister.

#### ERLE, J.:

I am of the same opinion. The provisions of the statute seem to be framed with particular care that a notice of objection shall be signed by the objector \*himself. This is apparent from the terms both of the seventh, and also of the seventeenth section. The 100th section speaks of a duplicate notice, which can only mean a duplicate original.

[ \*95 ]

Decision affirmed.

## CHARLES SCORE v. GEORGE HUGGETT.

(7 Man. & G. 95-97; S. C. 14 L. J. C. P. 74.)

1845. Jan. 16.

The occupier of part of a house, who has a key of the outer door, the landlord not residing in or occupying any portion of the premises, is entitled to be registered as a person occupying as owner or tenant (1).

City of Westminster.

[ 95 ]

Semble (per MAULE, J.), that "apartments" is a proper description of the premises so occupied.

Parish of St. James. Case of George Bedford, a claimant.

#### Notice of Claim.

Heorge Bedford. 7, Leicester Street, Regent Street.	Apartments.	7, Leicester Street, Regent Street.
--	-------------	--

George Bedford occupied apartments at No. 7, Leicester Street, in this parish, consisting of two rooms on the second floor, which communicated with each other, for which he paid 20l. 16s. a year rent. These rooms were occupied for four years by Bedford for the purpose of dwelling; and Bedford had the use of the back kitchen and yard, in common with other parties. The house consisted of

<sup>(1)</sup> Cited in Bradley v. Baylis (1881) 8 Q. B. Div. 195 (see pp. 224 and 235); S. C. 51 L. J. Q. B. 183,—J. G. P.

Score v. Huggett. four stories; the front kitchen on the basement was let to another party. The ground floor, first floor, and attics were each separately occupied by other parties. The access to the kitchen, and to the first, and other floors, was by the common street door of the house, a key of which was in the possession of each of the occupiers, who had, each, a key of the respective \*apartments in his own

[ •96 ]

The landlord, Mr. Kemp, did not reside in, or occupy, any part of, the house. No question arose as to residence or rating.

Upon these facts, the point raised for my decision was, whether the occupation of such two rooms in No. 7, Leicester Street, by the claimant, was sufficient to confer the elective franchise.

And upon that point, I decided in the affirmative.

occupation, and the exclusive right of access thereto.

(G:------) T) (J 1)

(Signed) D. C. M., Revising Barrister.

Merewether, for the appellant. \* \* \*

[ 97 ]

Cockburn, for the respondent, was not called upon.

TINDAL, Ch. J.:

In this case the claimant had the key of the outer door. The case, I think, cannot be distinguished from one where two families occupy one house—the one family living in rooms on one side of the staircase, and the other family, on the other side.

The other Judges concurring,

Decision affirmed, with costs.

1845, Jan. 28,

# GEORGE WANSEY v. ROBERT THOMAS PERKINS.

City of

(HILL'S CASE.)

City of London. [ 151 ]

(7 Man. & G. 151—155; S. C. 14 L. J. C. P. 75.)

The occupier of a floor in a house, in which the landlord himself resides, is a mere lodger and not entitled to be registered as a person occupying "as owner or tenant," although he has a key to the outer door (1).

James Hill duly gave notice to the overseers of the parish of Saint John the Baptist, that he claimed to have his name inserted in the list made by them of persons entitled to vote in the election of members for the City of London; and, in his notice of claim, he stated the particulars of his qualification to be "Three Rooms, 16, Budge Row."

<sup>(1)</sup> Cited in Bradley v. Baylis (1881) 8 Q. B. Div. 195 (see pp. 224 and 235); S. C. 51 L. J. Q. B. 183.—J. G. P.

I decided that Hill was not entitled to have his name inserted in the said list of voters, subject to the opinion of the Court upon the following case: WANSEY v. PERKINS.

The claimant occupied the whole of the second floor in a house No. 16, Budge Row. The floor consisted of three rooms, which were in the exclusive occupation of the said claimant, and were occupied by him as a dwelling-place and a printing-office. He occupied the rooms in question as tenant to one Knight, who occupied the shop and first floor in the house, and who resided therein. The outer or street door of the house was kept closed, and Knight had a key thereto, as also had the claimant.

No question was raised in the case, except as to the sufficiency of the qualification.

(Signed) T. J. A., Revising Barrister.

(The cases of four other claimants, and one party objected to, were consolidated with the above case (1).)

M. D. Hill, (with whom was Wordsworth) for the appellant. \* \* \*

Humfrey (with whom was Grove) for the respondent. \* \* \* [ 153 ]

M. D. Hill, in reply. \* \* \* [154]

Tindal, Ch. J.: [155]

If the premises in the occupation of this claimant were so completely divided from the rest of the house that the landlord had given up all control over them, the case would have been different. But here, the landlord lets the claimant into the possession of the second floor, the landlord himself retaining the possession of the rest of the house. This puts the claimant in the condition of a lodger or inmate. The relative position of such a party to the owner is well known. In this case the landlord remains the occupier of the house; and the claimant, who is a lodger, is not within the contemplation of the Act.

# CRESSWELL, J.:

The Court has already given its opinion upon this point in the case of Pitts v. Smedley (2).

(1) The nature of the qualification of "Chambers, 12, King's Bench Walk." one of the claimants was stated to be (2) Supra, p. 684.

WANSEY ERLE, J.:

·t. Perkins.

The distinction is pointed out in Fenn v. Grafton (1), and Monks v. Dykes (2). His Lordship also referred to Kearney's case (3).

Decision affirmed, with costs.

1845. *Jan*, 23,

## JOHN HINTON v. HUMPHREY HINTON.

(7 Man. & G. 163-166; S. C. 14 L. J. C. P. 58.)

Borough of Wenlock.

[ 163 ]

Whether the name subscribed to a notice of objection is so subscribed as to be commonly understood to be the same as that by which the objector is designated in the list of voters, is a question not of law, but of fact.

The Court will not remit a case to the Revising Barrister for the insertion of a fact which the barrister considered to be immaterial.

THE name of Henry Cooper was expunged from the list of persons entitled to vote in the parish of Much Wenlock, in the borough of Wenlock.

A person whose name was proved to be William Nicholas objected to Cooper's name being retained on the list. The notice of objection was signed "William Nicholas, of Colebrook Dale, in the parish of Madeley, on the list of voters for the parish of Madeley."

Madeley is a suffragan parish of the borough of Wenlock.

The notice was in all respects regular, and in conformity with the form prescribed by the 6 & 7 Vict. c. 18. The validity of the notice turned upon the question whether the objector was entitled to object at all, and, if so, whether his signature was sufficient.

The name in the list was William Nickless. The name of "William Nicholas," sent by the objector, was on the list of claimants on the church door. Nickless was intended for the objector's name by the overseer, and Nicholas, the objector, was the identical person whose name was written William Nickless in the list. The mistake had been committed in the lists of the preceding years. In 1843 William Nicholas applied to the Revising Barrister to correct the mistake. The Revising Barrister made the correction, and inserted the name, properly spelt, in the list of voters. The overseer of Madeley swore that the repetition of the error was owing exclusively \*to his own negligence. I held the notice valid, and the case of the objector being established, I expunged Cooper's name, which, if this Court are of a different

[ \*164 ]

<sup>(1) 2</sup> Bing. N. C. 617.

<sup>(2) 4</sup> M. & W. 567.

<sup>(3)</sup> Alcock, Reg. Ca. 22,

opinion, is to be restored. (The cases of thirteen other parties were consolidated with the principal case.)

HINTON ". HINTON.

(Signed) J. G. P., Revising Barrister.

Keating, for the appellant:

The mistake in the name of the objector was calculated to mislead the party objected to, and the case therefore falls within the principle of *Tudball* v. The Town Clerk of Bristol (1). \* \* \*

Gray, for the respondent:

[ 165 ]

This is a question of fact, and not of law; and it has been so argued on the other side. It falls, therefore, within that part of the interpretation clause of the Registration Act, which enacts, that "no misnomer or inaccurate description of any person, &c. in any notice, &c. shall abridge the operation of the Act with respect to such person, provided that such person shall be so denominated in such notice as to be commonly understood."

(Cresswell, J.: Upon that point, the Revising Barrister has either decided the fact, or stated something which he could not properly submit to us.)

Keating, in reply:

This is not more a question of fact than the residence of a party, which the Court have entertained. In cases from Sessions, the Court of Queen's Bench would decide whether a building was a tenement, or a pauper had gained a settlement. The question here is, whether, under the provisions of the statute, the objector is in a situation to object. Overseers cannot insert a name in a list of claimants, unless they receive a notice of claim.

Tindal, Ch. J.:

[ 166 ]

I think the answer given on the part of the respondent is conclusive. The question is one of fact, and not of law. If it had appeared that there had been an important variance between the name of the party, as subscribed to the notice, and that published in the list, the question might have assumed a different aspect. Here, the only difference between the two names is, that one is wrongly spelt, and that is a defect which is helped by the interpretation clause; which provides that no misnomer shall prevent the operation of the Act in case the name can be commonly

Hinton . Hinton. understood. Whether it can be so or not in the present case, is not a question of law, but of fact. As far as we can infer from the fact of the Revising Barrister having held the notice sufficient, he must have thought that the name could be commonly understood.

CRESSWELL and ERLE, JJ. concurring,

Decision affirmed (1).

1845. Jan. 27.

## GEORGE DEWHURST v. JOSEPH FEILDEN.

(7 Man. & G. 182-187; S. C. 14 L. J. C. P. 126.)

Borough of Blackburn. [ 182 ]

Two distinct buildings cannot be joined together in order to constitute a right to be registered as a borough voter under the Representation of the People Act, 1832 (2 Will. IV. c. 45), s. 27 (2).

Joseph Feilden, described on the list of voters as "Joseph Feilden, of Witten," was objected to as not being entitled to have his name retained upon the list of voters for the said borough in respect of the occupation of property described in the said list as "joiner's shop, warehouse and land, in Thunder and Back Lane, in the said borough." Feilden was duly objected to by George Dewhurst, and appeared in support of his vote. Feilden has, together with his uncle, jointly occupied as owners, for a time sufficiently long \*to confer a vote (as far as regards the mere question of time and occupation), a joiner's shop in Back Lane, worth, by itself, less than 201. a year, and a warehouse in Thunder, worth 111. a year, besides two yards in Thunder, occupied for the deposit of stones and flags; the two yards being worth together about 51. a year. These several premises are the joint property of Feilden and his uncle, and are occupied jointly in

[ \*183 ]

(1) Keating had moved (6th November) under the 6 & 7 Vict. c. 18, s. 65, for a rule calling upon the respondent to show cause why this case should not be remitted, in order that a certain statement might be added,—upon an affidavit that a fact had been proved, which the appellant considered to be material, but which the Barrister had refused to insert considering it to be immaterial.

#### TINDAL, Ch. J.:

By sect. 42 the Barrister is to state the facts which, in his judgment, are material. We have no authority to do that which is asked. The power of remitting the case under sect. 65, exists only where the statement is not sufficient to enable the Court to give judgment. That is not the ground of the present application.

#### Per CURIAM:

Rule refused.

(2) Repealed, subject to reservations, by 48 & 49 Vict. c. 3, s. 12: see now s. 5 of that Act. And compare 45 & 46 Vict. c. 50, s. 9, whereby a person may be qualified to be enrolled as a burgess by occupation of "any house, warehouse, counting-house, shop, or other building . . . in the borough."—J. G. P.

manner above stated. Feilden and his uncle are the joint owners of considerable property in the borough, and they occupy the whole of the said premises as workshops and stone places, for the purpose of building on, and repairing their said property. joiner's shop, the yards and the warehouse, are worth together above 20l. a year; but the joiner's shop alone is not worth 20l. a year, and the warehouse and yards alone are, together, not worth, independently of the joiner's shop, 201. a year. Thunder, where the warehouse and the two yards are situated, is 300 yards distant from the joiner's shop; and there are many buildings and other property, lying between the joiner's shop in Back Lane, and the warehouse and yards in Thunder; which premises so lying between the two, are the property, and in the occupation, of other and different persons. If the premises in Back Lane and those in Thunder, can be united, so as to confer a vote on Feilden, they are of more than sufficient value for that purpose; but if they cannot be united for that purpose, then the joiner's shop is of insufficient value to confer a vote on Feilden, and the warehouse and yards in Thunder are also of insufficient value to confer such vote.

I decided that Feilden occupied a joiner's shop, warehouse and land sufficient to entitle his name to be retained on the list of voters for the said borough, within the meaning of the 2 Will. IV. c. 45, s. 27.

(Signed)

S. T., Revising Barrister.

Cockburn, for the appellant:

[ 184 ]

The question in this case is, whether the buildings, not being within the same curtilage, may be joined together, so as to confer a vote under the 27th section of the Reform Act.

(CRESSWELL, J.: It does not appear from the case, what was the value of the yard.)

That point was not intended to be raised. The Act confers the franchise on the occupier of "any house" &c. of a certain value; that must mean any one house, in the same way as "a yearly rent" in sect. 20 has been decided to mean one single rent(1).

TINDAL, Ch. J.: The words are somewhat different.

CRESSWELL, J. referred to Webb v. The Overseers of Aston (2).

(1) See Gadeby v. Barrow, ante, (2) 58 R. R. 218 (5 Man. & G. 14). p. 647.

DEWHUEST v. FEILDEN.

[ 185 ]

DEWHUBST That case seems decisive of the present question. (The learned Feilden, counsel also referred to Sweetman's case (1).)

Kinglake, Serjt., for the respondent:

The important thing to be considered is the value of the premises in the occupation of the voter; and it is the same, in principle, whether that value is made up of one house or of more. The cases that have been decided under the Tenement Acts, the 59 Geo. III. c. 50, and the 6 Geo. IV. c. 57, are strong authorities upon the point. [He referred to Rex v. Macclesfield (2), Rex v. Tadcaster (3), Rex v. Gosforth (4), Rex v. Iver (5), Rex v. Newtown (6), Webb v. The Overseers of Aston, &c. (7), and Sweetman's case (1).] No reliance is to be placed upon the word "separately" in the twenty-seventh section of the Reform Act. It means nothing more than this,—that the house, &c. may be occupied with or without land; not that it must be a separate or single house, &c. that is to be occupied. The Legislature, at the time of passing that Act, evidently had the old scot and lot right of voting in view.

[ 186 ] Cockburn was not called upon in reply.

TINDAL, Ch. J.:

I think the Revising Barrister was wrong in the decision he came to in this case. The twenty-seventh section of the 2 Will. IV. c. 45, gives the right of voting in boroughs to every person who occupies certain premises, either as owner or tenant. The subject-matter of such occupation is "any house, warehouse, counting-house, shop, or other building." The first observation, and one which lies on the very surface, is, that these words are all in the singular number, and that it would have been just as easy to have used the plural. But the section does not stop there. The subject-matter of the occupation is required to be, "either separately, or jointly with any land within such city or borough, occupied therewith by him the same landlord, of the clear yearly value of not less than 10l." that if the house or building be not of that value, the amount may be made up by the conjunction of land. The rule expressio unius exclusio est alterius is, I think, applicable here; and I cannot see why the Legislature should have provided for the joint occupation

<sup>(1)</sup> Alcock, Reg. Ca. 27.

<sup>(2) 2</sup> B. & Ad. 870.

<sup>(3) 4</sup> B. & Ad. 703; 1 Nev. & M. 466.

<sup>(4) 1</sup> Ad. & El. 226; 3 Nev. & M. 303,

<sup>(5)</sup> Ib. 228; 3 Nev. & M. 28.

<sup>(6) 1</sup>b. 238; 3 Nev. & M. 306.

<sup>(7) 58</sup> R. R. 218 (5 Man, & G. 14).

of a building and land, and not for that of two different buildings, if it had been intended that the latter should confer the franchise. This view is aided by the form of the list of voters to be published by the overseers, as given in the 6 & 7 Vict. c. 18, schedule (B), No. 3 (1), where, in the fourth column, the "number of house (if any)" is required to be stated—which points more to a single definite building than to two or more united together. And it may very well be, that the occupier of a 10l. house might be considered in a fit condition to exercise the franchise, without its being intended that a party might eke out the value, by joining together several small tenements.

DEWHURST t. FEILDEN.

## MAULE, J.:

[ 187 ]

I am of the same opinion. The occupation of a 10l. house was probably intended as a test of the capacity and rank of the party to be entrusted with the franchise. Such a description of persons would be likely to be very different from those who occupied a number of tenements of smaller value. Suppose the Legislature had given the franchise to a man who kept a horse of a certain value, taking that as a test of his rank and capacity. It would not have been the same thing if he kept a number of inferior horses to make up the value. I think we should not, in these appeals, involve ourselves with the decisions on settlement cases. We ought to be spared discussions upon the Tenement Acts, which are not at all upon the same subject as the Reform and Registration Acts. The same reasons are therefore not applicable in the construction of them. In the present case the plain words of the Act ought to prevail.

# CRESSWELL, J.:

I think the case is really too clear for argument. In the very ingenious argument on the part of the appellant in Webb v. The Overseers of Aston, &c., this point was not argued; and it is not probable that it was omitted from any oversight.

# ERLE, J.:

I am of the same opinion. The twenty-seventh section requires that one building, of a certain value, shall be occupied, in order to obtain the franchise, or land may be joined to the building; but if the land is occupied by the party as tenant, it must be held under

<sup>(1)</sup> See now the form in the Registration Order, 1895, Sched. III.

DEWHURST c. Feilden.

the same landlord. It is not every species of land that may be joined to a building for that purpose. It is not correct, therefore, to say that the value alone was the criterion contemplated by the Legislature.

Decision reversed.

1845. Feb. 13.

MARSHALL v. BOWN. (7 Man. & G. 188-197; S. C. 8 Scott, N. R. 889.)

City of Lichfield.

A. having contracted for the purchase of B.'s house for a valuable consideration, sold it to C., D., E., F., G., and H. in equal shares; and caused a conveyance to be executed from B. to the sub-purchasers, as tenants in common. A. was not stated to have been a party to the conveyance, the purchase-money was paid to B. by the hands of A., but was the proper money of the sub-purchasers. The house was let, and the sub-purchasers received the rents for their own use respectively. The object of A. in proposing the purchase to the sub-purchasers, was to increase the number of voters; but the purchase on the part of the sub-purchasers was a bond fide investment of their money; they expected that the possession of the property would entitle each of them to vote, but there was no understanding

support any particular interest.

Held, that the conveyance was not void under the 7 & 8 Will. III. c. 25, s. 7, and that the sub-purchasers were entitled to be registered.

before or at the conveyance, that they should vote in any particular way or

Quære, if the conveyance would have been void if the increasing the number of voters had been the object of B. in conveying.

WILLIAM MARSHALL objected to the name of John Bown, and to those of five others, being retained on the second list of voters for the parish of St. Michael, in the city of Lichfield. I retained all the names subject to the opinion of this Court upon the following case:

The Parliamentary borough of the city of Lichfield is a county of itself, and, prior to the passing of stat. 2 Will. IV. c. 45, free-holders had the right to vote in the election of members for the said city. In the second list of voters, duly made out by the overseers of the parish of St. Michael in the said city, the following six names appeared:

Christian name and surname of each.	Place of abode.	Nature of qualification.	Street, lane, or other place in this parish where the property is situate.
Bown, John.	Wade Street.	Freehold house.	St. John Street.

(The other five names were inserted with the same qualification.) Objections were duly made to each of the above names being

retained in the said list in respect of the above qualification; and upon their appearing to support their title to have their names retained in the said list, it was proved that the names of Bown and of the other five, were inserted in the said list in respect of the same freehold house in St. John Street, and that they became and were the joint owners of it, under the following circumstances:

MARSHALL v. Bown.

Prior to Lady Day, 1843, one William Gorton contracted, in his own name, with the then proprietors of the house, for the purchase of it at the price of 292l. 5s. 0d.; and having, after such contract, bonâ fide sold the house to Bown and the five other persons above named in equal shares, he caused a conveyance of it, from his vendors to Bown and the five others, to be prepared by their solicitor. By this conveyance, which was afterwards duly executed by the vendors, the said house was, in consideration of the said sum of 292l. 5s. 0d., absolutely conveyed to Bown and the five other persons, to hold to them in undivided sixth parts, as tenants in common, in fee. The purchase money was paid to the vendors by the hands of Gorton, but was the proper money of Bown and the five others contributed by them in equal shares. The house was let to a respectable tenant at 15l. a year, and was worth, at least, that rent. The object of Gorton in proposing the purchase to Bown and the five others was, to increase the number of the voters for the city of Lichfield; but the purchase on the part of Bown and each of the above named persons, was a bonâ fide investment of their money, which they would not have made unless they had been satisfied with the value of the premises and the income they were to receive from the investment. They also all expected that \*the possession of the property would entitle them to votes for the city of Lichfield; but there was no stipulation or understanding, before, or at the time of, the conveyance to them, that they or any of them should vote in respect of the said house, in any particular way, or in support of any particular interest.

[ \*190 ]

Bown and each of the others had been in the receipt of 50s. in respect of their shares of the rents and profits of the said house for his own use, for twelve calendar months next before the last day of July, 1844, the said 50s. having been paid to each of them by the said W. Gorton out of the rent, which Gorton was authorised to receive on their behalf; and each of them had resided for six calendar months next before the last day of July within the said city, or within seven statute miles thereof.

It was objected that the conveyance was void and of none effect,

Marshall v. Bown. by reason of the provisions of stat. 7 & 8 Will. III. c. 25, s. 7, as being made to them in order to multiply voices, and to split and divide the interest in such house; and that under that Act, no more than one single voice ought to be admitted for the said house.

[ \*191 ]

[ \*192 ]

I was of opinion that there had been a bonâ fide purchase of the house by Bown and the five other persons, \*for a valuable consideration; and that the seventh section of the said statute did not apply to a conveyance made under such circumstances; and that the provision "that no more than one voice shall be admitted for one and the same house or tenements," related only to boroughs in which, at the time of the passing of the Act, the right of voting was in householders, or inhabitants paying scot and lot; and I was of opinion, on the whole case, that Bown and the other five persons were entitled to have their names retained in the list of voters for the city of Lichfield, in respect of their respective share in the said freehold house.

Similar objections were also made by Marshall to retaining in the same list for the parish of Saint Michael aforesaid, the names of five persons described in the said list as follows:

(The names of William Field and four persons were inserted in the list in respect of the same description of qualification as in the former case.)

The names of the five last-mentioned persons were inserted in the said list in respect of one freehold house adjoining that mentioned in the preceding case, of which they had become the bonâ fide purchasers for a valuable consideration, and were in receipt of the rents and profits, amounting to 15l. a year, and which had been contracted for and conveyed to them at the same time, and by the same parties, under similar circumstances to those above stated.

(The cases were consolidated.)

(Signed) J. B., Revising Barrister.

The question for the opinion of the Court is, whether the conveyance to Bown and the five other persons, of the freehold house first above mentioned, and the conveyance to Field and the other four persons of the freehold house secondly above mentioned respectively, is \*void and of none effect under stat. 7 & 8 Will. III. c. 25, s. 7, and whether, under the said Act, Bown and the five other persons, or any of them, is or are entitled to have his or their name or names retained in the said list of voters, and to be admitted to vote in respect of the first of such houses, and Field and

the other four persons or any of them in respect of the last of such houses respectively.

MARSHALL v. Bown.

(Signed) T. B., Revising Barrister.

The case was argued in last Michaelmas Term.

Byles, Serjt. for the appellant:

The decision of the Revising Barrister contravenes the provisions of the 7 & 8 Will. III. c. 25, s. 7. It is not necessary to consider how committees of the House of Commons have endeavoured to fritter away that statute. The intention of the vendor is the material thing to be considered, and not that of the vendee.

Kinglake, Serjt. for the respondent:

It is material to consider what was the state of the law before the 7 & 8 Will. III. c. 25, was passed. Before that Act the possession of a freehold, for one day only before the voting, was sufficient. The Act was intended to apply only to collusive conveyances, that were subject to certain conditions. The 10 Ann. c. 23, s. 1, may be considered \*as a legislative interpretation of the former Act. The form of the freeholders' oath, given in the 18 Geo. II. c. 18, s. 1, extended to cities being counties of themselves, by the 19 Geo. II. c. 28, and the provisions of section 4 of the latter Act, are material in the same view. A bonâ fide conveyance, for a valuable consideration, cannot be said to be made on purpose to multiply voices. The effect of the 7 & 8 Will. III. c. 25, was much discussed in the Okehampton case; but the counsel who supported the view now submitted on behalf of the appellant, did not put the argument so high as it has now been done. Elphinstone's case (1) was there referred to, and is in point.

[ \*193 ]

(MAULE, J.: It is \*not found in this case, that the conveyance was made in order to multiply voices, in the terms of the statute.

[ \*194 ]

Tindal, Ch. J.: The case mentions that it was the intention of an intermediate party, Gorton, to increase votes for the city. That does not seem to have been the object of the vendors: and that appears to be the material thing to bring the case strictly within the Act.)

In every case where a party purchases a freehold estate, he may
(1) 3 Luders, 370.

MARSHALL probably intend to acquire a vote, but that will not deprive him of bis right to do so.

Byles, Serjt. in reply:

Gorton had an equitable estate in the property, and he conveyed with the intention to multiply voices. The case is therefore clearly within the mischief contemplated by the Act. \* \* This being a highly remedial Act is not to be construed strictly.

(ERLE, J.: It can hardly be said to be that; as it avoids the conveyance, though there may have been a good consideration.

Tindal, Ch. J.: It would certainly be very hard that the conveyance should be avoided after the money had been paid by reason of the intention of the vendor, if the vendee was ignorant of such intention.

MAULE, J.: Your construction would amount to this,—here has been a fraud by one man, for which another is to be punished. The vendor here is the guilty party, if any, not the vendee.)

The vendee might recover the money, if he is innocent, as the consideration is illegal and has failed.

(Tindal, Ch. J.: But he may have laid out money and built upon the estate before the illegality of the vendor's intention was discovered.)

[\*195] Gorton may, for \*all purposes, be considered as the vendor, and the conveyance as his conveyance, within the statute. Three sorts of fraudulent conveyances are contemplated by the Legislature. Those of the first class are provided for by the 7 & 8 Will. III. c. 25; the second, by the 10 Ann. c. 23; and the third by the statutes of Geo. II. These Acts point to totally different abuses.

Cur. adv. rult.

TINDAL, Ch. J. now delivered the judgment of the Court:

The objection taken against the claim of Bown, and of the several other persons mentioned in the case, to their right of voting, as freeholders, in the election of members for the city of Lichfield, was this, that the six persons therein first named claimed the right of voting in respect of one and the same freehold house, and that the conveyance to those persons was void under the provisions of

the Act 7 & 8 Will. III. c. 25. That statute enacts that "all conveyances in order to multiply voices or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in Parliament, are hereby declared to be void and of none effect."

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The argument before us proceeded upon the supposition that the facts of the present case brought it within the scope and operation of that statute: and we are called upon to give the legal construction of that statute with reference to the abstract question, whether a bona fide conveyance, where the money was really paid by the purchaser, and there was no secret trust or reservation in favour of the seller, but where the object of the conveyance was to multiply voices and to split and divide the interest, falls within the provisions of that statute. Whenever the question comes before us, we shall be prepared to give our opinion upon it; \*but, as we think the facts stated in this case do not raise the question, it would be premature to do so on the present occasion. For, we think the obvious meaning of the statute, is, that in order to make the conveyance void, the seller must be party or privy to the illegal object intended by the conveyance; for, it would indeed seem to be an unreasonable consequence, and one which could never have been in the contemplation of the Legislature, that a person who sold property bonâ fide to several persons as purchasers, having no intention himself to evade the estate, no knowledge of any such object or design on the part of the purchasers, should afterwards, and at any distance of time, find the conveyance void, the land thrown back upon his hands, and himself liable to return the purchase-money, on account of its having been subsequently discovered that the purchase was made by the several persons to whom it was conveyed in order to split and divide the interest and to multiply votes. And the necessity of this privity and intention on the part of the seller, appears further from the subsequent statute 10 Ann. c. 23, which, after reciting the statute of Will. III. and that the subsequent statute was made for the more effectual preventing of such undue practices, proceeds to make provision for cases in which the object of the conveyance cannot but be known to the party who conveys the estate: and is still further evident from the 53 Geo. III. c. 49, which enacts that a devise made for the same purpose, shall be taken to be a conveyance within the meaning of the former statutes.

[ \*196 ]

Now, looking at the case before us, there is not only no statement of the fact, but no reason to infer the fact, that the former

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[ \*197 ]

proprietors of the house, who were the conveying parties, had any knowledge whatever of the object for which the house was purchased,

at the time they executed the conveyance to the six claimants. \*Gorton contracted in his own name with the proprietors for the purchase of the house, such proprietors, so far as appears, not having any knowledge whatever of any of the six persons to whom the conveyance was afterwards made, before the actual execution of the conveyance. Then, Gorton, as it is stated, after entering into the contract, bond fide sold the house to Bown and the other five claimants; and all that was done by the proprietors was, that, upon the request of Gorton, they executed the conveyance to such new purchasers.

And, as to the argument urged on the part of the appellant, that Gorton may be considered as the vendor, and the conveyance taken to be his conveyance, within the meaning of the statute, it appears a sufficient answer, that, upon the facts stated in the case, there is no proof that he had any thing to convey, or even that he was a party to the conveyance which is contended to be void under the statute (1).

As the case, therefore, seems to us not to be brought within the statute, we are of opinion that the objection taken before the Revising Barrister, never properly arose; and therefore, without giving any opinion upon the merits of the objection, it is sufficient to say the names of the six claimants in respect of the first purchase, and of the five claimants in respect of the second purchase (which was made under circumstances precisely similar to those of the first), were rightly retained on the list.

We therefore give our judgment for the respondents.

Judgment affirmed.

1845.

West Riding of Yorkshire. [ 198 ]

# ROBERT BAXTER v. EDWARD BROWN (2).

(7 Man. & G. 198-217; S. C. sub nom. Baxter v. Newman, 14 L. J. C. P. 193.)

A., B., C. and D. joined in a partnership to work a fulling mill. Money was subscribed by all the partners; with part of which, freehold land was bought, which was conveyed to A. and B. in fee; with other part a mill was built on the land, and machinery for the mill was purchased. By a

- (1) It was assumed in the argument (supra, 704), although not stated in the case, that Gorton,-for the purpose of extinguishing his interest, as equitable owner under the contract of sale to him, -had joined in the conveyance from his vendors to the subvendees, according to the usual practice.
- (2) Discussed in Bennet v. Blain (1863) 15 C. B. (N. S.) 518, 33 L. J. C. P. 63; Freeman v. Gainsford (1865) 18C.B. (N. S.) 185, 34 L. J. C. P. 95; Spencer v. Harrison (1879) 5 C. P. D. 97, 49 L. J. C. P. 188; Watson v. Black (1885) 16 Q. B. D. 270, 55 L. J. Q. B. 31.— J. G. P.

partnership deed executed by A., B., C. and D., the trusts of the land, mill, &c. were declared to be (among other things), that A. and B. should stand seised and possessed of all the estates, property, goods, &c. upon trust for the benefit of themselves and their partners as part of their partnership joint stock in trade, there was a provision in the deed that A. and B. might borrow money upon mortgage of the stock, property, estates, &c. belonging to the copartnership; and it was declared that the land, mill, &c. should be deemed and considered as or in nature of personal estate and not real estate, and be held in trust for the partners as part of their partnership stock in trade. A. and B., under the powers of the deed, borrowed money for the purposes of the partnership, for which they gave bonds and notes in their own names, but did not mortgage any part of the property.

Held, that each partner had an interest in the realty corresponding with

the amount of shares held by him in the partnership.

Held, also, that the money so borrowed had not the effect of mortgages on the shares of the partners.

Jonas Bateman, John Brookbank, and thirty-five other parties, claimed, at the revision of the list of voters for the West Riding of the county of York, A.D. 1844, to be entitled to vote for the West Riding, in respect of freehold shares in a mill, houses, and land, situate in the township of Pudsey, in the polling district of Bradford in the said Riding.

The claimants joined many other persons in forming a partnership to build and carry on their respective trades in a mill, which was built in manner hereinafter mentioned. Money was subscribed by all the partners, part of which was appropriated to buy freehold lands, \*which were conveyed unto and to the use of certain trustees, their heirs, and assigns absolutely. Other part of the money was appropriated to build the mill upon such lands; and the remainder was appropriated to buy machinery for the mill. By a general partnership deed executed by the trustees, the claimants and all the other partners, the trusts of the freehold lands so conveyed and of the mill then to be built, the machinery and every thing belonging or appertaining to the said lands, mills, and premises, were declared to be—that the said joint concern, trade, and business should at all times during the continuance of the copartnership be conducted and carried on in the names of the trustees, and the survivors and survivor of them. "And that all and singular the estates, property, goods, chattels, and effects belonging, or which shall belong to, or which have been, and shall from time to time be purchased by, or for, or on account of the said partnership, or for carrying on the said joint concern, trade, or business, shall be conveyed, transferred, delivered, and assigned to, and vested in, such trustees or trustee for the time being, who shall at all times stand seised and possessed thereof, and interested therein, upon trust, for the benefit BAXTER BROWN.

[ \*199 ]

BAXTER E. Brown. of themselves and their partners in the said joint concern, as part of their partnership joint stock in trade." And that all contracts, dealings, sales, purchases, payments, receipts, bills, notes, drafts, orders, securities, actions, suits, proceedings, matters, and things whatsoever, for, on account, or in respect of, or relating to the said joint trade, should be and be carried on in the names of the said trustees or trustee for the time being.

There were also other provisions in the deed, in the words following:

[ \*200 ]

[ \*201 ]

"That at all times, and from time to time, during the copartnership, it shall be lawful to and for the \*trustees for the time being, at the request and by the direction of three-fourth parts in value, of the partners who shall be present, either in person or by proxy, at any general meeting to be held after ten days' previous notice thereof in writing, to be affixed on the principal door of the said mill, by the committee for the time being, to take up, borrow, and raise upon the credit of the said joint trade, or by or upon mortgage, or other security, of all or any part or parts of the stock, property, estate, or effects of and belonging to the said copartnership any such sum or sums of money to be employed in the said joint trade as such three-fourth parts of the said partners as such last above-mentioned, or any other general meeting to be held in like manner shall order or direct; and that each and every of the said parties hereto, his, her, and their executors, administrators, and assigns, shall and will pay his, her, and their share of all and every sum and sums of money which shall be so taken up, borrowed, and raised, in proportion to the number of shares he, she, or they shall hold in the said joint trade. And it is hereby agreed and declared, that the said lands contracted to be purchased as aforesaid, and the mill and other buildings which have been, and shall be, erected and built thereon, and all other lands, tenements, and hereditaments which shall be purchased by, with, or out of the copartnership joint-stock moneys and effects, and be received in exchange, shall be deemed and considered as, or in the nature of, personal estate, and not real estate, and shall be held in trust for the said several parties hereto respectively, and their respective executors, administrators, and assigns, as part of their partnership stock in trade, and in the same parts, shares, and proportions as they are, and from time to time shall be, interested in, or entitled to, their partnership stock in trade, moneys, and effects: and it is hereby declared \*and agreed that the person or persons who shall advance or pay any money to

the trustees or trustee for the time being of the said copartnership or Company, their or his heirs, executors, administrators, or assigns, under their or his direction, upon any mortgage or mortgages, or other security of, or upon all or any part or parts of the said copartnership joint property, estates, and effects, or upon any exchange of the same or any part thereof, or otherwise pursuant to these presents, shall not be obliged or required to see to the application of such money, or be answerable or accountable for misapplication or non-application of the same, or any part thereof, or to see or inquire whether any order, authority, or direction for any such mortgage or security, or exchange be made pursuant, or in conformity, to the powers, authorities, and directions herein contained; and that all receipts which shall be given by the said trustees or trustee for the time being, any or either of them, or his, their, or any or either of their heirs, executors, administrators, or assigns, agent or agents, or by any other person or persons to whom the same money shall be paid, under their or his direction, shall be good and sufficient discharges for the sum and sums of money which therein or thereby shall be expressed or acknowledged to be, or to have been, received; and that every mortgage and security, and conveyance by way of exchange, which shall be made, executed, or given, by the said trustees or trustee for the time being, or any, or either of them, his, their, or any, or either of their heirs, executors, administrators, or assigns, shall be binding and conclusive on all the said partners, and their respective heirs, executors, administrators, and assigns. Provided also, and it is hereby further declared and agreed, that the persons elected, or to be elected, on all and every the present and future trustees and trustee thereof, and \*their respective heirs, executors, and administrators, shall now and always stand and be indemnified and saved harmless by the said copartnership in and for all lawful acts, deeds, and transactions done, performed and executed in pursuance, and by virtue, of these presents; and the lands, stock, property, estates, and effects of, and belonging to, the said Company or copartnership, shall, in the first place, be appropriated and applied,—and the same is, and are, hereby declared to be subject and liable,-to indemnify, exonerate, and discharge them, and every of them, of, from and against all actions, suits, and prosecutions whatsoever, and also to reimburse them, the said committee, trustees and trustee, and every of them. for the time being, their, and every of their heirs, executors, and administrators, estates and effects, all such costs, charges, expenses,

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\*202 ]

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[ \*203 ]

and demands, as shall or may happen or arise to them, or any of them, or which they or any of them shall reasonably expend, sustain or be put unto, and also subject and liable to such a reasonable allowance to the said committee for their loss of time, as a majority of the said partners shall adjudge in, for and concerning the trusts aforesaid, or any of them, or the execution or performance thereof."

The said mill was built according to the terms of the partnership deed, and the business and trade were carried on therein, in manner following:

The concerns of the Company were managed by a committee, appointed by a general meeting of shareholders; and the committee were in the occupation of the mill and premises, and employed servants to work it. The mill was used for the purpose of fulling cloth. The shareholders did not carry on one trade jointly together, but each shareholder brought his own cloth to be fulled at the mill. If any other person who was not a shareholder brought cloth to be fulled at the mill, \*he was charged a certain sum for the use of the mill, which was paid to the committee; and every shareholder who brought cloth to be fulled at the mill, was debited with the same sum proportionally, for the amount of cloth which he had fulled at the mill, in the general annual settlement of the profits arising from the use of the mill.

The trustees had, under the powers of the partnership deed, and with the consent of the general meeting of the shareholders, borrowed sums of money for the purpose of the mill, for which they had given bonds and notes in their own names only; and no part of the partnership property had been mortgaged.

The personal property of the Company was greater in amount than the sums so borrowed by the trustees, and was sufficient to meet such sums and interest thereon, and all other liabilities incurred either by the Company or by the trustees in their behalf.

The amount of shares possessed by each of the above claimants respectively in the real property of the Company, was sufficient to confer a vote, provided the interest acquired by such shares could be considered as an interest in the realty; but it was objected before the Revising Barrister, that the interest acquired by the above claimants as the owners of such shares was only an interest in personalty.

With regard to Bateman and J. Brookbank it was objected that the money so borrowed by the trustees on bonds and notes as aforesaid should be considered as a mortgage on the real property of the Company, and that such sums, with interest thereon, should be deducted from the value of the real property.

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I overruled the objections in the case of each of the above claimants, and allowed the votes of each claimant respectively.

[ \*204 ]

If this Court are of opinion that under the said partnership \*deed the shares of the said claimants respectively in the said property of the Company, cannot be considered as a legal or equitable interest in real property, then the votes of each of the above claimants respectively are to be disallowed. Or, if this Court are of opinion that the sums of money so borrowed by the trustees as aforesaid ought to be considered at law or in equity as a charge on the real property of the Company, then the right of voting of each of the above claimants, Bateman and Brookbank, to be disallowed, otherwise the decision of the Revising Barrister to be confirmed.

(The cases were consolidated.)

(Signed) P. A. P., Revising Barrister.

The case was argued in last Hilary Term (16th January).

### R. Hildyard for the appellant:

The claimants had only an interest in personalty; the trust deed expressly declaring that the lands, mill, and other buildings, shall be considered as personal, and not as real, estate. The question, a few years back, might have created some difficulty; but it is now set at rest by the case of Bligh v. Brent (1). \* \* The principles deducible from that case, are confirmed by Bradley v. Holdsworth (2). \* \*

[ 206 ]

Martin, for the respondent:

A decision in favour of the appellant in this case would have the effect of disfranchising and disqualifying a large body of electors.

(CRESSWELL, J.: They would not be disqualified. They would only be disentitled to vote in respect of this particular franchise.)

It is submitted that the claimants had an interest in real property. The fact of an account being to be taken of the profits will not prevent its being real estate.

(MAULE, J.: It seems that the partners in the concern were treated much in the same way as strangers. I do not see how the method of carrying on the business can vary the rights of the parties.)

(1) 47 R. R. 420 (2 Y, & C, 268), (2) 49 R, R, 670 (3 M. & W, 422).

BAXTER v. BROWN. [ \*207 ] If two farmers were occupiers of a barn and threshing machine, and threshed corn for the public as well as their own corn, that would ultimately be a beneficial enjoyment \*of real property.

(CRESSWELL, J.: The claim here is, not in respect of occupation. It is a question of title.

TINDAL, Ch. J.: The occupation is in the committee. The claimants claim a right to be registered as owners.)

[He cited Barker v. May (1).]

(CRESSWELL, J.: The argument on the other side amounts to this—not that the legal or equitable estate is altered; but that there is no real estate in the claimants or their trustees.)

That would be in effect to alter the nature of the estate. That can no more be done by agreement or contract than by will.

(MAULE, J.: In The Attorney-General v. Mangles (2), a testator, by his will, after certain legacies, gave, devised, and bequeathed unto his executors, their heirs, executors, and administrators, all the rest and residue of his estate, real and personal, upon trust, at such times as they might think fit, to sell, convey, or otherwise convert into money, the same, or any part thereof; and the testator directed that all the residue of his estate should be invested as it \*should be realised, and should be divided amongst all his children, in certain shares and proportions; and the testator directed that his trustees should have full power, in making such sales as in the said will were directed, to resort to either public or private sale, and to buy in and resell, and to defer any sale so long as they might think fit, and of causing any part or parts of his the testator's real or personal estate to be valued instead of being sold, and of allotting such parts to any or either of his the said testator's children at the amount of the valuation as a part of his or her proportion of his residuary estate, but to be considered as personal estate, and subject to the trusts in the said will declared respecting such proportions of residuary estate. The testator, at the time of his death, had one son and four daughters. The trustees, after the testator's death, sold a large part of the real and personal estate, amounting to 180,000l., and caused the remaining part of the residue, which consisted of real estate, to be valued, and the

(1) 9 B. & C. 489; 4 Man. & Ry. 386. (2) 52 R. R. 655 (5 M. & W. 120).

[ \*208 ]

same was valued at 90,000l., which was the son's share of the residue; and the sums of 45,000l., each amounting to 180,000l., were the shares of the daughters. The trustees allotted the estate which had been so valued at 90,000l. to the testator's son, at the amount of the valuation, and retained the sum of 180,000l., the proceeds of the part which had been sold for the benefit of the four daughters; and it was held that legacy duty was payable upon the amount of the part which was actually sold, but not upon the part which the trustees had allotted to the testator's son, under the discretionary power contained in the will. That case appears to be in your favour.)

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The parties interested in this will use their own property and divide the profits. This is not like the case of a railroad, as in *Bradley* v. *Holdsworth*; for there the land forms but a very minute portion of the stock; and a shareholder would not have such an \*interest in land as would confer the franchise.

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(ERSKINE, J.: Would it make any difference if he had the particular right to travel on the line in his own carriage?)

It is submitted that it would; and that if his share was of sufficient value in any one county that would give him the right to vote.

(Erskine, J.: Would it not be a mere easement?)

It would rather be a right of way over land which was vested in trustees in trust for himself and others; and that, it is submitted, would be an interest in land. In *Bradley v. Holdsworth*, also, it was expressly provided by the Railway Act that the shares should not constitute an interest in land. The present case is also very distinguishable from *Bligh v. Brent*. [See *Ex parte The Lancaster Canal Company* (1).]

(EBSKINE, J.: Would it make any difference in the present case if the trustees had been a corporation?)

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It would not; because the cestui que trust would be beneficially interested; if indeed a corporation can, strictly speaking, take a trust.

(MAULE, J.: In the case of a corporation it is the whole body—

(1) Mont. & Bligh, 94; 1 Deac. & Chitt. 411.

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the abstraction of law—that is seised. The members are no more seised than the members of a man's body could be said to be seised of his estate.)

[He referred to Buckeridge v. Ingram (1) and Townsend v. Ash (2).]

(CRESSWELL, J.: In the course of the argument in Bligh v. Brent, PARKE, B. made this observation: "Suppose lands to have been purchased for the purpose of an undertaking, and to have been conveyed to certain parties, who executed a deed of trust, upon trust to divide the surplus profits among the original subscribers; would their having the surplus profits give the original subscribers any estate in the land? It appears to me that the Company are as much distinct from the proprietors of shares as one man is \*from another.")

His Lordship was probably thinking, at the time, of a corporation. At most, the observation was extra-judicial. Later in the argument, Lord Abinger, C. B. said, "If a joint-stock Company purchase property, each individual shareholder has an interest in it; but the moment the Company becomes a corporation, the corporation has the property in trust for the individuals. That proceeds on the principle that a man cannot be trustee for himself." This seems to be inconsistent with the previous remark of Parke, B.

(CRESSWELL, J.: It does not appear so to me.

TINDAL, Ch. J.: The question in this case really is, whether the trustees are so in respect of the realty, or in respect of the profits.

MAULE, J.: Some of the terms in the trust deed appear to be inconsistent. In one place the property is spoken of as stock in trade; in another it is said that the trustees shall "stand seised" of it, which would apply to realty.)

The calling the property stock in trade will not make it the less realty; and there is nothing in the nature of the trust to show that it was not realty in fact.

(2) 3 Atk. 336. See also Drybutter v. Bartholomew, 2 P. Wms. 127. Per

<sup>(1) 2</sup> Ves. Jr. 652.

HARDWICKE, L. C. in Lord Stafford v. Buckley, 2 Ves. Sen. 182.

(CRESSWELL, J.: No doubt the property is realty; but the question is, what interest the parties took in it.)

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The case finds that each shareholder enjoyed his property by bringing his cloth to be fulled at the mill.

(ERLE, J.: Might not a deed be so framed as to avoid certain liabilities attached to the possession of realty, such as serving as a juror or an overseer: as if a party wished to lay out money in a trade which required the occupation of land; could he not make the purchase in such a way as to avoid these liabilities?)

It is submitted that he could not. All the liabilities incident to realty must attach to an interest in realty.

(CRESSWELL, J.: No doubt a party cannot hold realty and say he holds it as personalty, and so avoid these liabilities.)

There are several cases collected in Collier on Partnership (1) to \*show that the fact, of realty being held in partnership, makes no alteration in the nature of the property.

[ \*212 ]

# Hildyard, in reply:

There is no question that if partners hold realty, and it is entered in their books as partnership property, it may be so considered for certain purposes (2). What is contended for on the part of the appellant is, that where land is vested in certain parties as trustees, and, by a subsequent deed, the trust is declared that the profits shall be paid to certain other parties, these latter have no interest in the land. Suppose one of the partners in this mill had died intestate, would his share in the property have gone to his heirs or his executors?

(CRESSWELL, J.: That comes round to precisely the same question.)

It is assumed on the other side that the shareholders have an estate in land, and it is argued from that assumption that they cannot divest themselves of the incidents attached to realty.

(MAULE, J.: The fact of the declaration of trust not being contemporaneous with the conveyance to the trustees, will make

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There is nothing in the case to show that the trust was created by the conveyance.

(MAULE, J.: Then who would have the vote? The trustees?)

Probably they would, if they had a beneficial occupation. But that is a very different question. The shareholders have no particular privileges over the rest of the public, as they must pay for the use of the mill.

Cur. adv. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT:

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In this case thirty-seven persons claimed the right of \*voting for the West Riding of the county of York in respect of a qualification described upon the list as "freehold shares in a mill, houses and land." The Revising Barrister found, that the amount of the shares possessed by each of the claimants in the real property of the Company was sufficient to confer a vote, provided the interest acquired by such shares could be considered as an interest in real property. The objection taken before him was, that the interest acquired by the several claimants, as the owners of such shares, was an interest in personalty only, and not in land; but the Revising Barrister overruled this objection, as well as another which applied solely to the cases of two of the claimants, Bateman and Brookbank (to which objection we shall afterwards advert), and allowed the votes of all the claimants. And we are of opinion that the Revising Barrister was right in his decision, and that the votes of the several claimants ought to be allowed.

That the claimants took no legal interest in the real property, is placed beyond doubt. The freehold land, purchased with the money contributed by the several claimants and by other shareholders, was conveyed to trustees "unto and to the use of them, their heirs and assigns, absolutely:" the trusts subject to which the trustees were seised, being declared by the co-partnership deed subsequently executed by the trustees and the several members of the co-partnership thereby created. The only question therefore is, whether the claimants, take such an equitable interest in the realty as will, by law, give them the right to vote; for under the provisions of the 7 & 8 Will. III. c. 25, the 18 Geo. II. c. 18, the

2 Will. IV. c. 45, and the 6 & 7 Vict. c. 18(1), a person seised in equity will have the same right to vote as if he had the seisin in law, of a freehold estate of the value of 40s. by the year, according to the provision of the statute 8 Hen. VI. c. 7.

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And the ground on which we consider these claimants to have such right, is this, that the property of which the trustees are seised in trust for the benefit of the shareholders who form the co-partnership, is freehold land; that the co-partners by their committee are in possession thereof; that the trusts declared by the deed are no more than agreements and regulations, entered into between the co-partners for the better carrying on their joint trade by the means of such land and the mill erected thereon, and are not trusts which are inconsistent with an equitable seisin of the freehold in the co-partners; and, lastly, that it is found by the Revising Barrister that the amount of the shares of each of the claimants in the real property of the Company is sufficient in value to confer a vote.

It is undoubtedly true, as was urged at the Bar, that the trusts declared by the co-partnership deed are such as that a court of equity would deal with the real property as personalty, so far as was necessary to carry the intention of this trading co-partnership into execution. In general, there can be no question but that for all purposes necessary to effectuate the intention of the parties, personal estate may be considered as real, and real estate as personal, by a court of equity; as in the ordinary instance of money agreed or directed to be laid out in land (2); and so, in the instance of a real estate under an absolute trust or direction to sell; and against this general rule our decision in the present case will not in any manner militate. But, notwithstanding this acknowledged doctrine of the court of equity, no one can deny that the land still remains land, and nothing else; and there is no authority or decision that \*for the collateral purpose of giving a vote, which has no bearing upon or reference whatever to the objects of the deed or co-partnership, the right of the cestui que trust should not remain just as it would have been without such declaration of trusts. For, as to the declaration by the co-partners in the deed, "that the lands and buildings shall be deemed and considered as or in the nature of personal estate, and not real

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parish of A., in the county of B. for C., it could not be contended that by the mere bequest C. has a freehold in A

<sup>(1)</sup> See now 30 & 31 Vict. c. 102, s. 5.

<sup>(2)</sup> In the case of money bequeathed upon trust to buy Greenacre, in the

BAXTER C. Brown. estate," we think the generality of these words must necessarily be limited by the subject-matter of the trusts, declared by the deed, and that they can extend no further than the object and purposes of the deed require; and further, we think it may be considered as a very doubtful question whether the private agreement of parties, or any authority, short of that of an Act of Parliament, can deprive the owners of the freehold of the right of voting for a member of Parliament, which is a right inherent in the owners of the freehold, not for their own benefit, but for that of the community of which they form a part. But, however that may be, it appears to us such right is left altogether untouched by the objects and purposes for which the trusts of the deed now under consideration, are created This deed declares no trust whatever of the and declared. freehold; but, as it appears by the statement of the case that the land was purchased with the money of the several shareholders or co-partners, it follows that under the purchase deed there was a resulting trust as to the fee-simple and inheritance for their benefit; so that each of them would be entitled to a share in the beneficial interest therein, proportioned to his share of the purchase The partnership deed does not alter the proportions in which the parties are interested; nor does it confer on any stranger any portion of the interest in the land; it only regulates the mode in which the property shall be managed and enjoyed, according to the quantity of interest of each \*shareholder therein. And the estate, to use the language of Lord Eldon, in Crawshay v. Maule (1), when speaking of a freehold estate purchased by a partnership for trading purposes, "though personal in enjoyment," is "freehold in nature and quality;" and it is to the nature and quality of the estate we are to look, and not to the mode of enjoyment, when we have to decide whether it confers a vote.

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It was objected on the part of the appellant, that the case of Bligh v. Brent (2) was an authority against the claimants, inasmuch as it proved that the shares of a Company, the profits whereof were derivable from land, were personal property, not real. But we think it sufficient to advert to a broad ground of distinction between that case and the present. In the case referred to, the Company, that of the Chelsea Water-works, was a corporation created by Act of Parliament and charter from the Crown, of which the individual shareholders were corporators. The whole of the real property was vested in a corporation aggregate, who had the

sole management and control thereof, having power to convert it into personalty, or back again into realty, at their free pleasure; the individual corporators having, as individuals, no more interest in the freehold than perfect strangers, and no interest in the surplus profits of the concern, until they actually arise. present case, the freehold is in the trustees for the benefit of the individual co-partners in a trade, to be managed and conducted by a committee appointed by themselves. In many other cases of shareholders in joint-stock Companies, where the Company has been incorporated by Act of Parliament, the Legislature has expressly declared that the "shares be deemed personal estate, and transmissible as such, and not of the nature of real \*property." Such, was the case of The Vauxhall Bridge Company (1), and of The Lancaster Canal Company (2), and others; in which cases it may well be conceded, that there could be no freehold interest in the several shareholders so as to entitle them to vote; whereas, in the case before us, there is no other than a voluntary declaration by the parties themselves, that the real estate shall be considered as personal.

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Upon the principle, therefore, that land and mills built thereon, are the basis and subject-matter of the trade out of which the profits arise, which are to be distributed amongst the shareholders; that the trusts relate only to the management and conduct of the land and mills, and the trade carried on by means of the same; that there is no trust declared which is inconsistent with an equitable interest in the freehold in the respective shareholders; that the co-partners are, by their committee, in possession; and, lastly, that the value of each man's share is sufficient to enable him to vote; we think the shareholders had an equitable seisin in a sufficient estate to enable them to vote for the county.

As to the objection raised against the right of the two particular claimants, Bateman and Brookbank, we see no ground whatever for considering money borrowed by the trustees on bonds and notes, as having the effect of mortgages on their shares; and, indeed, this objection was little relied upon in argument.

On the whole, we think the decision is right, and that it ought to be

Affirmed.

1844. April 19.

### BLOODWORTH v. GRAY.

(7 Man. & G. 334-335; S. C. 8 Scott, N. B. 9.)

To say of a person that he has the venereal disease, is actionable, per se.

Case, for defamation. The first count, after stating the intention of the defendant to be, to cause it to be suspected and believed that the plaintiff, at the time of the committing, &c., was infected with the French pox, otherwise called the venereal disease, laid the words as follows: "He (meaning the plaintiff) has got that damned pox (meaning the French pox, otherwise called the venereal disease), from going to that woman on the Derby road." In the second count, the words alleged were, "Ah! that damned fellow Bloodworth! I am credibly informed that he has got the pox." In the third count, "He has got it," (meaning &c.).

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The declaration laid, as special damage, that one Palmer, who had been surety for the plaintiff for the rent of his farm, had, in consequence of the slander, withdrawn from his suretyship; and that, by means of the premises, the plaintiff's wife died, whereby the plaintiff had lost her comfort, assistance, and services (1); and the plaintiff fell sick and underwent great pain of body, &c.

Plea, Not guilty.

At the trial of the cause before Gurney, B., at the last Leicestershire Assizes, it appeared that the plaintiff, who was a farmer, was the son-in-law of the defendant, a major-general on half-pay; and that the marriage had taken place without his consent. The words were proved as laid, but the proof of special damage wholly failed. It was contended, on the part of the defendant, that the words were not actionable per se; but the objection was overruled, and the plaintiff recovered a verdict with 50l. damages; leave was, however, reserved to the defendant to move to enter a nonsuit.

Channell, Serjt. now moved accordingly; but he admitted the authorities were against him. He referred to Com. Dig. tit. Action upon the case for defamation (D. 29), and Carelake v. Mapledoram (2).

TINDAL, Ch. J.:

This case falls within the principle of the old authorities.

#### Per Curiam:

Rule refused.

(1) As to the effect of the death, see *Higgin's* case, Noy, Rep. 18; S. C. 2 Roll. Abr. 557, pl. 21; *Ib.* 568, pl. 2, 3; *Anon.* cited 1 Keble, 847;

Fetter v. Beale, 1 Salk. 11; Baker v. Bolton, 10 R. R. 734 (1 Camp. 493).
(2) 2 T. R. 473.

### BOODLE v. CAMBELL (1).

(7 Man. & G. 386—397; S. C. 2 Dowl. & L. 66; 8 Scott, N. R. 104; 13 L. J. C. P. 142; 8 Jur. 475.)

1844. May 3.

To a declaration in debt by A. against B. for 1911. 5s. due for 21 years' rent under a demise, by indenture, B. pleaded as to 40l. 10s., parcel, &c., that, before the making of the indenture, A. conveyed parcel of the demised premises to C., in fee, who devised the same to D., his wife, and E. and their heirs; that, after the commencement of the suit, D. and E. "gave notice to B. of their title, and required him to pay them such portion of the rent, not paid over to the plaintiff at the time of the giving of the said notice, as might, on a just apportionment, be found to be the just proportional part thereof in respect of the said parcel of the demised premises; and D. and E. then gave notice to, and threatened B., that if he should neglect or refuse forthwith to pay over such proportional part to D. and E., they would immediately eject and expel him from the said parcel; that the said sum of 40l. 10s. was the sum which, upon a just apportionment of the said rent, would be, and was, the proportional part of the rent in respect of the said parcel, and was at the time of the notice unpaid to A.; that the rent sued for, accrued and became due after the death of C.; that, if B. had not paid the 40l. 10s. to D. and E., they would have proceeded to eject and expel the defendant from the said parcel of the demised premises, wherefore P., after the commencement of the suit, necessarily and unavoidably paid them that sum; and that A. never had any thing in the said parcel of the demised premises, except as appeared in that plea: Held, that this was neither a good plea of eviction, the notice being subsequent to the rent becoming due; nor a good plea of payment, inasmuch as the alleged payment was not in satisfaction of any charge upon the land or of any debt due from A.

DEBT, for 1911. 5s. due upon a covenant.

[The declaration stated that by indenture of the 27th of July, 1840, the plaintiff demised unto the defendant certain lands and tenements, from the 25th of March then last past, for the term of ten years thence next ensuing, at a yearly rent of 76l. 10s., payable half-yearly, on the 29th of September and the 25th of March in every year, and the defendant covenanted to pay the said rent on the appointed days. The declaration then averred that by virtue of this demise the defendant entered upon the demised premises, and was possessed thereof for the term granted: and alleged as breach that on the 29th September, 1842,  $2\frac{1}{2}$  years' rent, amounting to 191l. 5s., was in arrear and unpaid.]

Third plea, as to the sum of 40l. 10s., parcel of, &c., that, before and at the time of the making of the indenture of lease next thereinafter mentioned, the plaintiff was seised, in her demesne as of fee, of and in parcel of the demised premises, to wit, one full and undivided moiety of and in certain closes parcel of the said demised premises called, &c.; and the plaintiff being so seised, afterwards,

(1) Referred to by FRY, L. J. in *Underhay* v. Read (1887) 20 Q. B. D. 209, 220; S. C. 57 L. J. Q. B. 129.

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and before the making of the indenture in the declaration mentioned, to wit, on the 31st of December, 1838, by a certain indenture of bargain and sale, then made between the plaintiff and Edward Boodle, the plaintiff, in consideration of 5s., then therefore paid by Boodle to the plaintiff, did bargain and sell the said parcel of the said demised premises to Boodle, habendum to Boodle. his executors, &c., from, &c. for the term of one whole year, &c. prout patet; by virtue of which indenture, and by force of the statute, &c., Boodle then became possessed of the said parcel for the said term so to him therein granted: And the plaintiff being so interested, and Boodle being so possessed as aforesaid, afterwards, and before the making of the indenture in the declaration mentioned, to wit, on the 1st of January, 1839, by a certain indenture of release then made between the plaintiff of the first part, Boodle \*of the second part, and Richard Parry Jones of the third part, the plaintiff released the said parcel to Boodle, habendum unto Boodle and his heirs for ever, to such uses as Boodle should in the manner therein mentioned appoint; and, in default of such appointment, to the use of Boodle and his assigns for his life, sans waste; and, from the determination of that estate in his lifetime, to the use of Jones, his executors and administrators, during the life of Boodle, in trust for Boodle and his assigns during his life; and, from the determination of the estate so limited to Jones, his executors and administrators, to the use of Boodle, his heirs and assigns for ever: and by the last-mentioned indenture Boodle declared that any wife of his who should become his widow, and who, but for such declaration, would or might notwithstanding the uses and limitations thereinbefore contained, be entitled to dower out of the hereditaments thereby released, should not have or be entitled to dower, or any right, title, or interest to the same or any part thereof; and thereupon Boodle then became seised, in manner aforesaid, of the said parcel. And Boodle, being so seised, afterwards, to wit, on the 16th of February, 1841, duly made and published his last will and testament in writing, bearing, &c., and signed by him Boodle, and attested and subscribed in the presence of Boodle by two credible witnesses; and thereby, amongst other things, devised the said parcel of the demised premises to his wife Ann Boodle and John Pickstock, habendum unto and to the use of Ann Boodle and John Pickstock, their heirs and assigns: E. Boodle. afterwards, to wit, on, &c. died so seised, without having made any appointment, and without having altered or revoked his said

will; whereupon and whereby Ann Boodle and John Pickstock then became and thence had been and still were seised of the said parcel of the demised premises, as of fee: That the plaintiff, at the time of \*the making of the indenture of release, and thence unto and at the time of the making of the indenture in the declaration mentioned, was in possession of the said parcel of the demised premises: That, after the commencement of the suit, and before that day, to wit, on the 9th of January, 1843, Ann Boodle and Pickstock gave notice to the defendant of the premises in the plea mentioned, and then required the defendant to pay to them such portion of the said rent reserved by the indenture in the declaration mentioned not paid over to the plaintiff at the time of the giving of the said notice, as might, on a just apportionment of the said rent be found to be the just proportional part thereof in respect of the said parcel of the demised premises; and Ann Boodle and J. Pickstock, then gave notice to the defendant and threatened the defendant, that, if he should neglect or refuse forthwith to pay over to Ann Boodle and J. Pickstock such proportional part of such rent, they would immediately proceed to eject and expel the defendant from the said parcel of the demised premises, and should duly put the law in force against the defendant as they might be advised: That, at the respective times when the said parcel of the said debt became due as in the declaration mentioned, and when the said notice was given, the said sum of 40l. 10s. was and yet is the sum which, upon a just apportionment of the rent reserved by the indenture in the declaration mentioned, would be, and was, the just proportional part of the said rent in respect of the said parcel of the demised premises; and that, at the time of the giving of the said notice, the said sum of 40l. 10s. was wholly unpaid to the plaintiff: That the rent whereof the said sum of 40l. 10s. was parcel as aforesaid, accrued and became due to the plaintiff under and by virtue of the indenture in the declaration mentioned, after the death of E. Boodle, to wit, for the period which elapsed between the 29th of September, \*1841, and the said 29th of September, 1842: That, if the defendant had not paid to Ann Boodle and J. Pickstock the said sum of 40l. 10s., Ann Boodle and J. Pickstock would have proceeded to eject and expel the defendant from the said parcel of the demised premises, and to put the law in force against him, pursuant to the said notice: Wherefore the defendant, afterwards, and after the commencement of the suit, and before that day, to wit, on, &c., did necessarily and unavoidably pay to

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Ann Boodle and J. Pickstock the said sum of 40l. 10s.; as he lawfully might, for the cause aforesaid: And that the plaintiff never had any thing in the said parcel of the demised premises except as appeared in that plea. Verification. *Profert* was made in the plea of the indenture of the 31st of December, 1838.

Special demurrer to this plea, assigning for causes—that it altogether denied the title of the plaintiff, and, in fact, amounted to a special plea of nil habuit in tenementis as to parcel of the premises, which the defendant was estopped from pleading (1)—that it contravened the rule of law that a tenant shall not dispute his landlord's title, and the rule of law that a man shall not contradict his own indenture, &c. Joinder.

Channell, Serjt. (with whom was Willes), in support of the demurrer:

This plea, which is in bar only of the further maintenance of the

action, is clearly bad in substance. It is not a plea showing an assignment by the lessor of part of the premises, but on being examined will be found to be an informal plea of eviction; and, if so, it is defective for not showing that the alleged eviction took place before the rent became due: Com. Dig. Pleader (2 W. 50). An attempt will be made to liken \*this case to that of a payment to a party having title paramount; but, although there are cases which, at first sight, appear to resemble the present, on examination, they will be found to be distinguishable. \* \* Here, there was no charge upon the land, nor is there a payment of any debt due from the plaintiff. [He referred to Sapsford v. Fletcher (2), Taylor v. Zamira (3), and Pope v. Biggs (4).]

Talfourd, Serjt. (with whom was E. V. Williams), contrà:

This is neither a plea of nil habuit in tenementis, nor a plea of eviction: it is a special plea of payment. [He referred to Pope v. Biggs (4), Johnson v. Jones (5), Sapsford v. Fletcher (2), and Taylor v. Zamira (3).]

[ 393 ] Channell, Serjt. in reply. \* \*

- (1) Vide 4 Nev. & M. 29. The estoppel by the indenture appearing on the record, the plaintiff might avail himself of it on demurrer without replying the estoppel: 1 Wms. Saund. 325 (note 4).
  - (2) 4 T. R. 511. Stated 32 R. R. 671.
- (3) 16 R. R. 668 (6 Taunt. 524).
- (4) 32 R. R. 665 (9 B. & C. 245; 4 Man. & Ry. 193). As to the grounds of the decision in that case, see 4 Man. & Ry. 193 (α).
- (5) 48 R. R. 714 (9 Ad. & El. 809; 1 P. & D. 651).

TINDAL, Ch. J.:

It appears to me that this plea cannot be supported. It must be considered either as a plea of eviction and expulsion, or as a plea of payment of a portion of the rent by compulsion to some one authorised to receive it, by reason of having a charge upon the If it is to be looked upon as a plea of eviction, the defendant was bound to show that the eviction took place before the rent became due. So far from that being so, the fact is otherwise, for the alleged eviction does not appear to have taken place until after action brought. The plea, therefore, as a plea of eviction, affords no answer to the plaintiff's claim. Is it then a plea in the nature of a plea of payment to a special agent of the landlord? The cases that have been cited are distinguishable. In Sapsford v. Fletcher (1), there was a claim for ground-rent; and the tenant was liable to a distress unless he paid it. Having paid the ground-rent in order to relieve himself from that pressure, it was held that he might treat such payment, as a payment to his immediate landlord. So, \*in Pope v. Biggs (2), where the premises had been mortgaged, and the tenant received notice from the mortgages, who demanded the rent, and received it in satisfaction of interest due upon the mortgage; it was held that this was a good payment. There, the principal, at least, was a charge upon the land; and it might be considered, that the mortgagor had appointed the mortgagee his agent to receive the rent if he thought fit to demand it (3). Here, the plea alleges that the plaintiff, before making the lease to the defendant, conveyed part of the property in respect of which the rent is claimed, to one Edward Boodle, whose devisees, after the commencement of the action, set up a claim to a proportional part of the rent. On what ground is it that the sum of 40l. 10s., rather than any other sum, has been fixed upon as the proportional part of the rent to which these devisees are entitled? What power is there to apportion the rent? Where a party, having granted a lease of premises, afterwards parts with a portion of them, the tenancy is still subsisting; and the law steps in to apportion the rent between the parties entitled (4). But the doctrine of apportionment does not apply here. The defendant is not tenant of part of the premises to the devisees of E. Boodle. Those parties are

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<sup>(1) 4</sup> T. B. 511.

<sup>(2) 32</sup> R. R. 665 (9 B. & C. 245; 4 Man. & Ry. 193).

<sup>(3)</sup> But the judgment in Pope v. Biggs, appears to have proceeded upon

less plausible grounds; vide 4 Man. & Ry. 193 (a).

<sup>(4)</sup> Vide Co. Litt. 148 a; Roberts v. Snell, 1 Man. & G. 579, 589.

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not before the Court; and the jury could not apportion the rent. In so doing they would be taking upon themselves to make a division, when one of the parties would not be bound by, and might not be satisfied with, the apportionment. There is this further difficulty; it does not appear that this sum of 40l. 10s. is any charge upon the land at all. The devisees might \*choose to have the land back again, and the defendant is not paying a sum for which the plaintiff is liable. It seems to me, therefore, that on neither ground is this plea an answer to the action, not being so either as a plea of eviction or as a plea of payment, and that the plaintiff is entitled to judgment.

### COLTMAN, J.:

I also am of opinion that this plea is bad, on the grounds stated by the Lord Chief Justice. If it is to be treated as a plea of eviction, it alleges an eviction subsequent to the time of the rent becoming due, and is insufficient on that ground. Neither do I think that it can be considered as a plea of payment. If it is to be so treated, it must be the payment of a debt due from the plaintiff; but it does not appear that there was any debt due from the plaintiff to Ann Boodle and John Pickstock. It may be that they might have some remedy against him for their share of the mesne profits: but by the conveyance to them by the plaintiff of part of the premises, no debt has been constituted between them.

### ERSKINE, J.:

I am of the same opinion. This plea cannot be held bad on the ground that it amounts to a plea of nil habuit in tenementis, for the reasons given in Sapsford v. Fletcher (1) and Pope v. Biggs (2). But it cannot be treated as a plea of payment, there being no debt due from the plaintiff to Ann Boodle and John Pickstock, nor any charge on the land, so as to fall within Johnson v. Jones (3). As a plea of eviction, it is bad, as already observed, for not showing an eviction before the rent became due.

# [ 397 ] CRESSWELL, J.:

In Johnson v. Jones (3), LITTLEDALE, J. held the plea to be good; not as a plea of nil habuit in tenementis, nor as a plea of eviction, but because it showed that the lease was made subject to a prior

<sup>(1)</sup> And see T. 41 Edw. III., Fitz.

Abr. tit. Accompt, pl. 33; F. N. B.

(2) 32 R. R. 665 (9 B. & C. 245).

(3) 48 R. R. 714 (9 Ad. & El. 809;

116, Q. n.; 1 Vin. Abr. 161, pl. 8, 9.

charge, viz. a mortgage, which the tenant was compelled to pay. I agree that the present plea is not a plea of nil habuit in tenementis. It is either a plea of eviction, bad because it alleges an eviction subsequent to the rent becoming due; or a plea of payment, bad because it shows neither a payment to the plaintiff nor a payment made by his authority. Neither does it set up a payment of a debt due from the plaintiff, or of a charge upon the land, so as to bring the case within any of the cases cited.

Judgment for the plaintiff.

## REYNOLDS v. BARFORD (1).

(7 Man. & G. 449—456; S. C. 2 Dowl. & L. 327; 8 Scott, N. R. 233; 13 L. J. C. P. 117; 8 Jur. 961.)

In a sheriff's return to a writ of fi. fa. a reasonable degree of certainty is sufficient. Under the 8 Ann. c. 14, s. 1, the landlord is entitled as against the execution creditor, only to rent due at the time of the seizure. But if the sheriff returns that he has paid so much "for rent due for the premises," the Court will intend that the payment was for rent due at the time of the seizure.

Where the sheriff returns that he has retained a sum for possessionmoney, it is no ground for quashing the return, that the plaintiff is charged with more possession-money than the amount payable by him for keeping possession.

On the 1st of February, 1844, certain goods of the defendant were taken in execution under a f. fa. On the 4th, Mary Clark caused the officer in possession to be served with a notice of claim. On the 8th, the defendant obtained, under the Interpleader Act, a Judge's order—that the sheriff be discharged; that the goods seized under the fieri facias herein be sold, and the produce thereof be paid into Court, deducting expenses, unless within a week, the claimant shall give security to the satisfaction of the Master to the amount of the levy—the claimant in the first instance to pay possession-money from this day till the goods are sold, or security be given, but ultimately by the losing party; that an issue be tried at the next Assizes for Surrey, in which the claimant shall be plaintiff, and the execution creditor defendant; the question to be whether the goods seized were, at the time of the seizure, the goods of the claimant: all other questions reserved.

On the 15th the defendant was served with notice from the landlord of a claim of 11l. 5s. for a quarter's rent, due at Christmas.

(1) Followed, In re Benn Davis, Ex parte The Pollen Trustees (1885) 55 L. J. Q. B. 217, 54 L. T. 304.

Boodle c. Cambell.

> 1844. *May* 25.

[ 449 ]

REYNOLDS c. BARFORD. [ \*450 ] On the 18th of April, Mary Clark having omitted to give the security required, an order was made discharging the former order (1), barring \*the claim of Mary Clark, and directing the proceeds of the sale to be paid to the execution creditor.

On the 20th of April, the sheriff made the following return:

"Surrey. By virtue of the annexed writ to me directed, I have caused to be made of the goods and chattels of John Barford therein named, 22l. 2s., out of which I have paid 11l. 5s., for rent due for the premises whereon the said goods and chattels were taken in execution; and I have retained 6l. 12s. for levying the said execution, keeping possession of the said goods and chattels, and selling the same by public auction, and for poundage; and the residue thereof, being 4l. 5s. I have ready to pay to Frederick Reynolds in the said writ named as therein I am commanded: and I further certify that the said John Barford hath not any other goods or chattels in my bailiwick whereof I can cause to be made the residue of the debt and damages therein mentioned, or any part thereof."

Channell, Serjt., on behalf of the plaintiff having obtained a rule nisi, to quash the return,

May 25.

[ \*451 ]

your return?)

Byles, Serjt. now showed cause:

The dates in this case are material. If the order stands in all its parts, the sheriff is discharged. The main ground of objection to this return is understood to be that the rent was not due at the time of the seizure.

(Channell, Serjt.: Though the rent was not due in fact, the objection is that the return does not state when the rent became due. The plaintiff also objects that the sheriff had no power under the Interpleader Act to charge the plaintiff with the expense of keeping possession.)

The rent did not accrue whilst the sheriff was in possession. There is a complete answer to the objection upon the affidavits. But it is contended that the return is insufficient per se. The sheriff \*makes his return according to the information communicated to him by the notice.

(Cresswell, J.: Must not you pledge yourself to the truth of

(1) The sheriff being discharged by the first order, and being no longer not be discharged as to him.

The notice is dated February 15th, and states the rent to be "now due and owing," which means that there was an arrear of rent. Looking at this written document the ground of the application fails.

BARFORD.

(TINDAL, Ch. J.: You do not say that the rent was due at the time of the seizure.)

If the return is good in form, it is true in fact. The plaintiff was not entitled to rule the sheriff to return the writ. The sheriff was discharged by the first order: under which order he sold.

(CRESSWELL, J.: But you have made a return.)

We were not bound to make it.

(Cresswell, J.: Then it may be quashed.)

The return does the plaintiff no harm.

(CRESSWELL, J.: And it does you no good.)

After the order the sheriff ceases to act as sheriff and acts merely as stakeholder.

(COLTMAN, J.: There must be some mode of ascertaining what the expense is.)

After the order the plaintiff was precluded, not only from ruling the sheriff to return the writ, but also from taking any exception to the return when made. The sheriff has no interest in the matter in dispute.

(TINDAL, Ch. J.: Does not the second order, by discharging the first, set the matter at large?)

It is submitted that it does not. The first order is not discharged so far as that order discharges the sheriff. He was no party to the second order, and could not be deprived by it, of any benefit which he had obtained under the first. It may be admitted that the rent must be due at the time of the seizure; but this return may receive the same construction as the Act itself, in which the language is equally general, the words of the fourth section being "that no goods, &c., lying, &c. shall be liable to be taken by virtue of any execution, unless the party at whose suit the said execution is sued

REYNOLDS v. BARFORD. [ \*452 ] out, shall, before the removal \*of such goods from off the said premises by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such sums or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution.

(CRESSWELL, J.: There are several returns under this statute in Tidd(1).)

If the present return is held good, all the forms found in Tidd will be right. *Hepworth* v. *Sanderson* (2) shows, that no action would lie upon this return, and that the Court would allow it to be taken off the file if necessary.

Channell, Serjt. (with whom was Leech), in support of the rule:

The sheriff has no right to charge the plaintiff with possessionmoney.

(COLTMAN, J.: How does it appear upon this return that he is so charged?)

It certainly does not appear how the charge for possession is constituted.

(COLTMAN, J.: Have we any thing to do with the truth of the return?)

If an action is brought for a false return, the sheriff must prove that the rent was due at the time of his entry. The sheriff might, at the trial, say that such was not the meaning of the statement in the return.

(TINDAL, Ch. J.: The sheriff could not stand upon the ground of affixing to the language of his return a meaning which would show that he had returned matter which he was not authorized to return.

COLTMAN, J.: If the sheriff returned that he had levied 201., and had paid away 151. in a manner not justifiable, would he not remain liable?)

If it be clear that the sheriff cannot make the deduction, the Court will, it is conceived, quash this return.

(1) Tidd's Appendix, 8th ed. 371.

(2) 8 Bing. 19; 1 Moo. & Sc. 64.

(CRESSWELL, J.: Would not the execution creditor in that case apply for a rule calling upon the sheriff to pay over the money levied, without making such deduction? It \*may be that here the sheriff has not paid over enough; should you not have applied to the Court for a rule calling upon the sheriff to pay over to you the money levied? Suppose the sheriff had returned that he had paid rent which accrued due after the seizure in execution, could we quash the return?)

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In Rex v. The Sheriff of Middlesex (1), the sheriff returned that he did, on, &c. arrest and take the body of the defendant, and detain him until afterwards he rescued himself out of the sheriff's custody, and that afterwards, and before the return of the principal, he was not found in the sheriff's bailiwick. This return was quashed on the ground that it did not state that the arrest had taken place within the county. (He was then directed by the Court to go to the second point.)

At common law, the Court would not quash the sheriff's return, because it appeared that the sheriff had improperly kept possession. But the case is different when the sheriff applies for relief under the Interpleader Act, and obtains that relief on the terms of not charging any further expense of keeping possession. The Court, in the exercise of its equitable jurisdiction over its own officers, may quash a return made under the statute in which such a charge is improperly inserted.

(Tindal, Ch. J.: Upon an application to quash for insufficiency, we must look at the face of the return. I do not see how we can take notice of what does not appear on the return itself.)

If the return cannot be quashed for insufficiency, the Court may set it aside, as being made in fraud of the sheriff's own agreement.

TINDAL, Ch. J.:

We wish to look at the old returns in Dalton.

Cur. adv. vult.

[ 454 ]

TINDAL, Ch. J. now delivered the opinion of the Court:

This was a rule to show cause why the sheriff's return to a writ of *fieri facias* should not be quashed. The return was as follows: His Lordship then read the return as above set out (2).

(1) 1 B. & Ald. 190.

(2) Vide supra.

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The principal objection urged against the return was, that it did not show distinctly that the rent paid to the landlord, was due at the time when the sheriff made the seizure, but was consistent with the rent being due only at the time of the return: and it was argued that no intendment could be made to support the sherif's return. No authority, however, was cited to show that a rule of such extreme rigour has ever been applied to sheriffs' returns: on the contrary, cases are not wanting to show, that in making returns to writs, a reasonable degree of certainty is sufficient, and at least not such precise certainty required as in pleading as was said by the Court in The City of London's case (1). Thus, in a case where the King sued a writ founded on the Statute of Provisors (27 Edw. III. stat. 1, c. 1), which requires that the defendant should be warned two months before \*the return, and the sheriff returned præmunire feci, &c. quod esset coram justiciariis, &c. ad idem (which is evidently a misprint for diem (2)), in breve contentum, ad faciendum quod istud breve requirit: it was objected (3) that it did not appear that he had warned him two months before the return; to which it was answered (4) that it should be intended to be as the writ requires; and, if the sheriff has not done his office duly, he may have his remedy by writ of deceit: 39 Edw. III., 7 Bro. Retorne de Brief, pl. 56 (5). So, where a scire facias issued

(1) 8 Co. Rep. 128a. The (second) objection taken in that case, was that the return was by way of recital and not of direct affirmation. To which the COURT answered: "This is not upon a demurrer in law, but upon a return upon a writ of privilege, upon which no issue can be taken or demurrer joined, nor upon our award in this does any error lie; and therefore the return is only (nient auter), but to certify (asserteiner), the Court of the truth of the matter, in which such precise certainty is not required as in pleading." This resolution in the Case del citie de Londres, was referred to in Burnes's case, 2 Roll. Rep. 157, where the return to a habeas corpus was held good, notwithstanding its alleged uncertainty.

Although the term "certainty" is here used, it may be thought that the analogy between the uncertainty arising from the statement by way of recital, of that which would more properly form the subject of positive allegation, and the uncertainty which arises from the omission to set out in any manner, either by way of recital or by way of positive allegation, that, without the existence of which, the return would be altogether nugatory, is not very strong.

- (2) This misprint occurs in both editions of the Year Books.
- (3) By Cavendish, Serjeant, afterwards Ch. J. of K. B.
- (4) By Finchden, King's Serjeant, afterwards Justice of Common Pless, who said, that in writs at common law there must be fifteen days between the teste and the return of process, but that in pleading it was never alleged that this interval had elapsed.
- (5) Rex v. The Bishop of Chicketer, P. 39 Edw. III. fo. 7, Fitz. Abr. tit. Beturne de viscount, pl. 61. The principal question in that case was. whether parties were bound to take notice of an Act of Parliament before it had been proclaimed in the County

against a parson, to have execution of an annuity, the sheriff returned that he had commanded the bailiff of the franchise, who had returned to him that long before the return of the writ the parson had resigned his benefice to another, et quod non habet bona neque catulla infra, &c. It was objected that he ought to have returned quod non habet bona neque habuit tempore receptionis brevis; for it might be that now he has not but had then: but it was answered that it shall be intended by this return, that, at the time of the receipt of the writ, he had them not: and afterwards the Court held the return good enough: 2 Edw. IV. fo. 1, pl. 1 (1).

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The case last cited has a striking analogy to the present. The present return, after it has stated a seizure under the writ, specifies a payment of rent due to the landlord; and in so doing must be intended to refer to such rent as is due to the landlord, according to the rules of law under a seizure by the writ, that is to say, rent due at the time of the seizure.

If, in truth, the rent was not due at the time of the seizure, an action for a false return would, we think, clearly lie on this return, which, as against the sheriff, would be understood to mean that the rent was due at the time of the seizure; for, he could never be allowed to defend himself in such an action by putting a construction on his own return making it bad, when it admits of another construction which will make it good.

It was further objected, that, by the order made in the interpleader rule in this case, the costs of keeping possession were directed to be borne by the claimant; and that the return is bad because it claims a deduction for possession-money. To this the answer is, that the possession-money payable by the claimant is but a part of the possession-money, namely, that which became

Court; and whether a statute was good without the assent of the Commons. Both of these questions were ruled by Thorpe (Ch. J. of C. P.) in the affirmative; and judgment was given that the Bishop should be put out of the King's protection, and should forfeit his goods and chattels; but whether his body should be taken or not, the Court would advise, &c.

(1) This does not appear to have been a final decision; for, after stating that the Court "held the return good enough," the report immediately proceeds as follows: "Afterwards Prisor (Ch. J. of C. P.) said—the sheriff's deputy is in the hall, and we can send to him to see if he will amend the return in this point. Winslode, clerk, said to the justices, Prisot being out of Court (hors del Place), that the return was made to the sheriff, ut supra, by the bailiff of the franchise; wherefore, &c.

"DANBY, J.: Then the amercement shall be upon the bailiff.

"MOYLE, J.: Well, so I think it shall be &c." P. 2 Edw. IV. fo. 1, pl. 1.

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ue subsequently to the making of the order; that there is other possession-money which the sheriff is entitled to claim against the fund; and that it does not appear that he has deducted any other than that which he has a right to. If, in fact, he has deducted more than he was entitled to, the party is not without his remedy.

Rule discharged.

1844. May 29. [ 457 ]

### REDMOND v. SMITH AND ANOTHER.

(7 Man. & G. 457-476; S. C. 2 Dowl. & L. 280; 8 Scott, N. R. 250; 13 L. J. C. P. 159; 8 Jur. 711.)

To a declaration on a policy of assurance on a ship, the defendant pleaded, that there was not any agreement signed by the master, and seamen, or any of them, specifying what wages each seaman was to be paid. the capacity in which he was to act, or the nature of the voyage in which the ship was to be employed.

Held, bad, on general demurrer (1).

Assumpsit, on a policy of insurance.

The declaration stated that the plaintiff, by certain persons called or known by the name, style, and firm of H. and J. Johnston & Co., the plaintiff's agents in that behalf, on the 2nd of July, 1842, caused to be made a certain policy of assurance, [upon the ship Brigand, and averred (inter alia) the loss of the ship and failure of the defendants to pay the amount of the policy].

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The defendants pleaded, first, non assumpsit; the first count, that the said policy was made, and that the said loss of the said ship happened, after the passing of a certain Act of Parliament made and passed in a Session of Parliament holden in the fifth and sixth years of the reign of King William IV., "to amend and consolidate the laws relating to merchant-seamen of the United Kingdom, and for forming and maintaining a register of all the men engaged in that service "(2)—that the said ship \*was, at the several times of sailing on the said voyage, and of the loss in the

[ \*462 ]

declaration mentioned, respectively a British-registered ship of the burden of eighty tons and upwards, and that the crew of the said ship then consisted of divers, to wit, twenty seamen, and twenty other persons (not being apprentices), and of one master, to wit, one Robert Morris Hunt-that there was not at the time of the In this report it has been (1) There was also a special demurrer fully.

to the second plea, which is now of no importance, and the report has been shortened by omitting so much as relates thereto. In the report in 7 Man. & G. the declaration is set out summarised.—J. G. P.

(2) Repealed by 7 & 8 Vict. c. 112; see now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 114.

sailing of the said ship on the said voyage, or at any other time before or after, any agreement in writing with the said master and the said seamen and other persons, or any of them, signed by the said master and the said seamen and other persons, or any of them, specifying what monthly or other wages each of such seamen and other persons, being part of the said crew, or any or either of them was to be paid, the capacity in which he was to act, or the nature of the voyage in which the said ship was intended to be employed; contrary to the statute in that behalf. Wherefore the defendants said that the said voyage was wholly illegal.

REDMOND r. Smith.

General demurrer to the sixth plea (1).

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The defendant joined in demurrer upon the demurrers to each of these pleas.

Channell, Serjt., in support of the demurrer:

\* \* With respect to the sixth plea, founded upon the 5 & 6 Will. IV. c. 19 (2), reliance will probably be placed on Suart v. Powell (3). \* \* When the voyage is illegal, a policy on that voyage is illegal; but that is not the case here.

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(Tindal, Ch. J.: The object of the statute was the protection of seamen, not to enable the Government to see whether a proper number of English seamen were employed or not.)

A contract made in contravention of a statute for the protection of the public, cannot be enforced; but that rule has no application to the present case. [He cited Law v. Hodson (4), Bensley v. Bignold (5), Little v. Poole (6), Wetherell v. Jones (7), Forster v. Taylor (8), and

(1) In the margin of the demurrerbook the following points were stated on behalf of the plaintiff,-that the sixth plea is defective in substance, inasmuch as it alleges no facts which would constitute such an illegality in the voyage as to render the policy void, or which would afford any answer to this action; that the plea is defective in substance, inasmuch as by the 5 & 6 Will. IV. c. 19, the agreement required to be entered into with seamen before they are carried to sea on any voyage, is to be entered into with them by the master of any ship or vessel, and the penalty for default is inflicted on the master; and the owner of any ship or vessel, not having knowledge of the master's default, cannot be prejudiced so as to prevent his recovering on a policy effected on such ship.

(2) Repealed by 7 & 8 Vict. c. 112; see now 57 & 58 Vict. c. 60, s. 114.

- (3) 1 B. & Ad. 266.
- (4) 10 R. R. 513 (2 Camp. 147; 11 East, 300).
  - (5) 24 R. R. 401 (5 B. & Ald. 335).
  - (6) 32 R. R. 630 (9 B. & C. 192).
  - (7) 3 B. & Ad. 221.
- (8) 39 R. R. 698 (5 B. & Ad. 887; 3 Nev. & M. 244).

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Cope v. Rowlands (1).] The contract of insurance in this case is not illegal per se; and it has no connection with the contract between the master and the seamen. The non-observance of the provisions of a statute as to one contract, does not vitiate another independent and collateral contract; and whatever may be the effect of the non-signature of the articles in an action between the parties by whom they ought to have been signed, it can have no operation here.

Byles, Serjt., contrà:

[The sixth plea shows that the voyage was illegal, and that the vessel was not sea-worthy. The plea states such a contravention of the statute as disentitles the plaintiff to sue on the policy.] The preamble discloses the scope of the whole Act. The object of the second section is, that both the seamen and the master shall have the benefit of articles; and it prohibits the master of any ship therein described, from carrying to sea any seaman without first entering into those articles.

(COLTMAN, J.: It is not said, that it shall not be lawful to carry out any ship. The objection would be the same if one seaman only omitted to sign the articles.)

There would be this difference, that the omission as to one seaman would not make the vessel unseaworthy. [He referred to Suart v. Powell (2), Law v. Hollingsworth (3), and Sadler v. Dixon (4).]

But if this were not so, or if the illegality of the voyage would not affect the policy, the plea amounts to a plea of unseaworthiness, though informally pleaded; and the allegation of illegality may be rejected as surplusage. Sailing without a competent number of seamen properly qualified renders the ship unseaworthy: [Clifford v. Hunter (5), Tait v. Levi (6), Law v. Hollingsworth (7).] This species of unseaworthiness is not within the general rule that seaworthiness at the inception of the risk is sufficient: Hollingworth v. Brodrick (8). There is an obvious difference between the non-execution of the articles of agreement as to one single seaman and non-execution by the whole crew. It is immaterial that this is a time policy.

- (1) 46 R. R. 532 (2 M. & W. 149).
- (2) 1 B. & Ad. 266.
- (3) 7 T. R. 160. Stated 52 R. R. 777, 782.
  - (4) 52 R. R. 784 (8 M. & W. 895).
- (5) Moo. & Mal. 103; 3 Car. & P. 16.
- (6) 13 R. R. 289 (14 East, 481).
- (7) 7 T. R. 160. Stated 52 R. R. 777, 782.
  - (8) 7 Ad. & El. 40.

Channell, Serjt. was stopped by the Court.

REDMOND v. Smith.

#### TINDAL, Ch. J.:

Under the sixth plea the defence set up is, that the policy was effected upon a voyage which was illegal, as \*being contrary to the provisions of the statute 5 & 6 Will. IV. c. 19 (1). A policy on an illegal voyage cannot be enforced; for it would be singular, if. the original contract being invalid and therefore incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that, where a voyage is illegal, an insurance upon such voyage is invalid. has been decided in many cases. Thus, during the war, policies effected on vessels sailing in contravention of Convoy Acts (2) were held void (3). So, where the voyage was against the provisions of the East India Company Acts (4), or the South Sea Company Acts (5), or the General Navigation Act (6); which statutes were made with reference to the general policy of the realm. But it appears to me that the 5 & 6 Will. IV. c. 19, was passed for a collateral purpose only; its intention being to give to merchantseamen a readier mode of enforcing their contracts and to prevent their being imposed upon. The present case is undoubtedly brought within the provisions of the first section of this statute by the allegations contained in the sixth plea. The fourth section enacts that if the master do not comply with the previous requisitions, he shall be liable to a penalty; but it is nowhere said that such noncompliance shall make the voyage illegal; the section merely provides a remedy against the master. Neither can I consider this as a case of unseaworthiness. The cases cited were cases in which there was an incompetent crew; but there is nothing here to show that the crew \*was not both sufficient and competent. I think, therefore, the sixth plea is also bad, and that thereon also our judgment must be for the plaintiff.

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Repealed by 7 & 8 Vict. c. 112.
 See now s. 114 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

<sup>(2) 38</sup> Geo. III. c. 76; 43 Geo. III. c. 57.

<sup>(3)</sup> See Wainhouse v. Cowie, 4 Taunt. 178; Darby v. Newton, 6 Taunt. 544, 2 Marsh. 252.

<sup>(4) 9 &</sup>amp; 10 Will. III. c. 44; 33 Geo. III. c. 52. See Johnston v. Sutton,

<sup>1</sup> Doug. 254; Camden v. Anderson, 5 T. R. 709, 6 T. R. 723, 1 Bos. & P. 272; Chalmers v. Bell, 3 Bos. & P.

<sup>(5) 9</sup> Ann. c. 2; 42 Geo. III. c. 77; 47 Geo. III. st. 1, c. 23. And see Toulmin v. Anderson, 1 Taunt. 227; Hodson v. Fullarton, 4 Taunt. 787.

<sup>(6) 6</sup> Geo. IV. c. 109.

REDMOND COLTMAN, J.:

e. Smith.

The sixth plea raises a question as to the legality of the voyage insured, by alleging that the captain omitted to comply with the requisitions of the 5 & 6 Will. IV. c. 19. The contract of insurance was not originally illegal; but it is suggested that something has occurred which renders the voyage illegal. The question then, in effect, is, whether the statute prohibits all voyages where its provisions are not observed—a question to be determined upon the language of the statute and the nature of those provisions. captain is forbidden to take out seamen who are not under articles. The argument must go this length—that if one seaman belonging to this vessel, has not signed the articles, the whole voyage will be illegal. The object of the Legislature was to protect seamen from imposition. The articles are to be read over to every seaman before he signs; and it imposes a specific penalty upon the master for any default. All this is for the benefit of the seamen.

It has been contended that the non-compliance with the requisitions of the statute renders a vessel unseaworthy (1). \*No case has been cited that sustains that proposition; nor has it been attempted to be shown that the crew were not perfectly competent to the duties which they had to perform.

Per Curiam (2):

Judgment for the plaintiff (3).

1844. May 24.

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# BURGESS v. BOETEFEUR AND BROWN.

(7 Man. & G. 481—510; S. C. 8 Scott, N. R. 194; 13 L. J. M. C. 122; 8 Jur. 621.)

By a statute (25 Geo. II. c. 36, s. 5) if two inhabitants of any parish give notice to a constable of any person keeping a disorderly house in such parish, the constable is to go with such inhabitants to a justice of the peace, and upon their entering into a recognizance to produce material evidence against such person, is to enter into a recognizance to prosecute with effect such person at the next Sessions; and such constable is to be allowed all reasonable expenses of such prosecution, to be accertained by two justices, and is to be paid the same by the overseers of such parish; and in case such person be convicted the overseers are forthwith to pay 10% to each

(1) And therefore no obligation is laid on a seaman suing for wages, to produce the articles or to give notice to the captain or owner to produce them: Bowman v. Manzelman, 11 R. R. 716 (2 Camp. 315). And if, in such action, any objection is meant to be founded upon the articles they must be pro-

duced by the defendant: Ibid.

- (2) Cresswell, J. was sitting at Nisi Prius.
- (3) And see Hinckley v. Walton, 3 Taunt. 131; Wilson v. Foderingham, 1 M. & S. 468; Armstrong v. Lewis, in error, 41 R. R. 10 (2 Cr. & M. 274; 4 Moo. & Sc. 1).

of such inhabitants; and in case such overseers neglect or refuse to pay, upon demand, the said sums of 10l. and 10l., such overseers and each of them, are to forfeit to the person entitled to the same, double the sum so refused or neglected to be paid.

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In an action by A., an inhabitant of X., against C. and D., as overseers, to recover a penalty under this statute, it appeared that A., and another inhabitant B., had given the requisite notices with respect to a disorderly house kept by E., and that E. was prosecuted and pleaded guilty, while F. and G. were overseers of the parish; and that after C. and D. came into office E. was called up for judgment and sentenced. A. thereupon demanded in writing the sum of 10l. from C. and D., but they refused to pay it. There were churchwardens in the parish, but no demand had been made upon them.

Held, that E. was not to be considered as convicted until the judgment of the Court upon the indictment against him was pronounced (1); and therefore that the demand for the reward was properly made upon, and the action rightly brought against C. and D., and that their predecessors F. and G. were not liable.

Held, also, that no objection having been taken to the form of the demand either at the trial or on obtaining a rule nisi to enter a nonsuit, it was too late to do so upon the argument in support of the rule.

Held, also, that it is not necessary that the demand should be in writing. Held, also, that it was not necessary to make the demand upon the churchwardens as well as upon C. and D., the overseers, or to join the former in the action; and that the action was well brought against the latter, upon whom the demand was made.

Quære, whether churchwardens are included in the term "overseers" in the statute, so as to be liable to be called upon to pay the reward.

The defendants having made an admission, for the purpose of the cause, that they were "the overseers" at the time the demand in question was made; semble, that they were not thereby precluded from contending that the churchwardens were also overseers, and should have been joined in the demand.

DEBT. The first count of the declaration stated that the defendants on, &c. were, &c. indebted to the plaintiff in the sum of 20l. being forfeited by an Act, \*"for the better preventing thefts and robberies, and for regulating places of public entertainment, and punishing persons keeping disorderly houses," whereby, and by force of the statute in that case made and provided, an action accrued to the plaintiff to demand and have of and from the defendants the said sum of 20l. parcel, &c. There were two other similar counts, in each of which a like sum was claimed.

Plea, nil debent.

At the trial, before Coltman, J. at the sittings for Westminster, during last Hilary Term, the following facts appeared.

The plaintiff was an inhabitant of the parish of Paddington, in which the defendants were the overseers of the poor for the year

(1) And see Rex v. Bridger, 1 M. & W. 145; Reg. v. Whitehead, 2 Moody, C. C. 181.

[ \*482 ]

Burgess c. Boetefeur. 1843—1844. On the 6th of September, 1842, the plaintiff, and one Falkus, another inhabitant of the same parish, gave the following notice to William Wallis, the constable of the parish, and to John Watson and William Charles Carbonell, the then overseers of the poor thereof, in pursuance of the statutes 25 Geo. II. c. 36, s. 5, and 58 Geo. III. c. 70, s. 7.

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"Middlesex, to wit.-To William Wallis, constable of the parish of Paddington, in the county of Middlesex, and within the metropolitan-police district, and to John Watson and William Charles Carbonell, overseers of the poor of the said parish: We, Wharfe Burgess, of No. 22, \*Frederick Street, in the said parish, and John Falkus, of No. 19, Frederick Street, aforesaid, two of the inhabitants of the said parish, paying scot and bearing lot therein, do give you, and each of you, notice that James Mitchell, of the said parish, doth keep a disorderly house in the said parish, to wit, at a messuage and premises situate No. 17, Frederick Street, in the said parish; and we do hereby require you, the said constable and overseers, forthwith to go with us, before some one of her Majesty's justices of the peace in and for the said county, to the intent that such proceedings may be had for the prosecution of the said James Mitchell for the said offence, as in and by a statute made and passed in the twenty-fifth year of the reign of the late King George the Second, intituled, &c., and also in and by a statute made and passed in the fifty-eighth year of the reign of his late Majesty George the Third, are directed and required. As witness our hands, this 6th day of September, 1842.

(Signed) "WHARFE BURGESS.
"JOHN FALKUS."

Two other similar notices were given in respect of other parties. Watson and Carbonell having declined to interfere in the prosecution, the plaintiff and Falkus, and Wallis, the constable, attended before a magistrate, and respectively entered into the recognizances required by the former statute, the former, to give or produce material evidence against the parties, and the latter, to prosecute them with effect at the next General Sessions for Middlesex, held in October, 1842. Indictments were accordingly prepared against the parties, and they severally pleaded guilty. The judgment was respited that the nuisances might in the meantime be abated; and this having been done, the parties were afterwards (in June, 1843) brought up for judgment, when they were each fined 1s. and

discharged. Before this time, viz. at Easter, 1843, the defendants \*were appointed overseers of the poor of the parish. The costs of BOETEFEUR. the prosecutions were afterwards settled by the magistrates, and paid by the defendants to Wallis.

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In November, 1843, the plaintiff and Falkus served three notices of demand upon the defendants; of one of which the following is a copy.

"To Alexander Boetefeur and Charles Brown, overseers of the poor of the parish of Paddington, in the county of Middlesex:

"Whereas, Wharfe Burgess, of &c., and John Falkus, of &c., being on the 6th day of September, in the year of our Lord 1842, and still being, two of the inhabitants of the said parish, paying scot and bearing lot therein, did give notice in writing to William Wallis, then constable of the same parish, and serve the like notice on John Watson and William Charles Carbonell, or one of them. they the said John Watson and William Charles Carbonell then being overseers of the poor of the said parish, that James Mitchell did keep a disorderly house in the said parish, to wit, at a messuage situate No. 17, Frederick Street, in the parish aforesaid, and we did thereby require the said John Watson and William Charles Carbonell, and also the said constable, forthwith to go with us before one of her Majesty's justices of the peace in and for the said county, to the intent that such proceedings might be had for the prosecution of the said James Mitchell for the said offence, as in and by a statute made and passed in the twenty-fifth year of the reign of the late King George the Second, intituled &c., and also in and by a statute made and passed in the fifty-eighth year of the reign of his late Majesty King George the Third, are directed and required: and whereas the said constable did, a reasonable time after such notice from us, namely, on the 8th day of September in the year aforesaid, attend with us before George Long, Esq., then being one of her Majesty's justices of peace in and for \*the said county, and one of the police-magistrates of the metropolis, then sitting at the Police Court, Marylebone, in the said county, and within the metropolitan-police district; and the said John Watson and William Charles Carbonell, or one of them, having had reasonable notice to attend before such justice, both neglected to attend such justice; and upon us and each of us the said Wharfe Burgess and John Falkus making oath before the said justice, that we did believe the contents of the said first-mentioned notices to be true.

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and entering into a recognizance in the penal sum of 201. each, to give, or produce, material evidence against the said James Mitchell for such offence, the said constable did enter into the recognizance required by the said statute of George the Second, to prosecute with effect the said James Mitchell for such offence, at the next General Session of the peace to be holden in and for the said county. as to the said justice did then seem meet: and whereas the said constable did accordingly prosecute the said James Mitchell for such offence at the said Session, and the said James Mitchell was thereupon convicted of such offence: now, I the said Wharfe Burgess, as such inhabitant as aforesaid, do hereby demand of you the said Alexander Boetefeur and Charles Brown, as such overseers as above mentioned, the sum of 10l., and require you forthwith to pay the same to me, to which sum I am entitled by virtue of the statutes aforesaid, or one of them; and I the said John Falkus, as such inhabitant as aforesaid, do also demand of you as such overseers, and require you forthwith to pay to me, other 101., to which I also am entitled as aforesaid. Dated, this 4th day of November. in the year of our Lord 1843.

(Signed) "WHARFE BURGESS.
"JOHN FALKUS."

The money not having been paid by the defendants in pursuance of these notices, the present action was \*brought in the following December, in order to recover the penalties.

The following admissions were put in on the part of the defendants: That on the 6th September, 1842, Wallis was constable of the parish, having been duly appointed to serve as such between Easter, 1842, and Easter, 1843; that Watson and Carbonell were on the 6th September overseers of the poor of the parish, having been duly appointed to serve as such, from Easter, 1842, to Easter, 1843: that on the said 6th September the plaintiff and Falkus were inhabitants of the parish, paying scot and bearing lot therein: that the defendants were the then overseers of the parish duly appointed, and were such on the 4th November, 1848.

The attorney who conducted the prosecutions was called as a witness, and stated that he was employed by Wallis; that he made the necessary advances from time to time at Wallis's request, who had generally attended to the business; but that he was also employed by the plaintiff and Falkus, who were his regular clients, to watch their interests, and that he had looked to them for payment

of his expenses. He had received however 40l. from Wallis, out of the money paid to him by the overseers.

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Wallis was also called as a witness; and he stated that he had conducted the prosecutions, had taken a very active part in them, and had subpænaed the witnesses. He stated, also, that he was not used to the conducting of prosecutions, and had asked the attorney for the plaintiff and Falkus to assist him, and that he appeared before the grand jury as prosecutor; but he admitted, on cross-examination, that he was not consulted as to the bringing of the parties up for judgment.

It was also proved, on the part of the defendants, that there were two churchwardens for the parish; and \*that no notice of demand had been served upon them or either of them.

[ \*488 ]

It was objected on the part of the defendants,—first, that the action did not lie against the present defendants, as they were not the overseers at the time of the conviction of Mitchell and the other parties; which, it was contended, took place at the time they pleaded Guilty, when Watson and Carbonell were overseers; secondly, that if the judgment were to be taken as the conviction, still there should have been a demand upon the churchwardens as well as upon the overseers; and, thirdly, it was urged that there was no evidence to show that Wallis had been the prosecutor of the indictments; but that they had really been prosecuted by the plaintiff and Falkus; and upon this point Clarke v. Rice (1) was cited. The learned Judge overruled the objections, reserving leave to the defendants to move to enter a nonsuit upon the two first points; and he left it for the jury to say, whether or not the prosecutions had been conducted by Wallis; whereupon the plaintiff obtained a verdict for the sum claimed, 601.

Bompas, Serjt., in last Hilary Term, moved to enter a nonsuit, pursuant to the leave reserved, and also for a new trial for misdirection, upon the ground that the learned Judge had left it to the jury to say whether Wallis was the prosecutor; and that the verdict was against the evidence. A rule nisi being granted,

Byles, Serjt. (with whom was Corrie) now showed cause. \* \* \*

Channell, Serjt. (with whom was F. V. Lee) in support of the [496] rule. \* \* \*

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[ 503 ]

TINDAL, Ch. J.:

This case comes before us upon a motion for a nonsuit, or for a new trial, upon the ground that there was no evidence to support one of the material allegations in the declaration.

Three grounds have been urged for setting aside the verdict; first, that the action is brought against the wrong overseers, inasmuch as the penalty was incurred by, and should be enforced against, the parties who were overseers in the year 1842; secondly, that the demand served upon the present defendants was insufficient and improper in point of form; and, thirdly, that the churchwardens of the parish being also overseers, should have been joined in the demand.

The first of these appears to be the main and principal ground of objection. The action is brought upon the stat. 25 Geo. II. c. 36, s. 5, against the defendants as overseers of the poor of the parish of Paddington, for that a demand having been made upon them by the plaintiff for the sum of 10l. which had become due from them under the provisions of that statute, they neglected to pay him that amount, whereby an additional sum of 10l. might be enforced against them. I say the action is brought upon that statute, because although the subsequent Act (58 Geo. III. c. 70, s. 7) puts it in the power of the overseers, upon notice given to them, themselves to prosecute any party keeping a disorderly house, yet if they think proper to decline doing so, the prosecution \*goes on under the provisions of the former Act; and in this case, the overseers did so decline. (His Lordship here read the 25 Geo. II. c. 36, s. 5.)

The first question then is, who were the overseers of the said

parish at the time the conviction took place. The information was laid in the year 1842, when the parties prosecuted pleaded Guilty. The defendants contend that the conviction took place at that time. The plaintiff, on the other hand, says that there was no conviction then, nor till the parties were subsequently brought up and received the sentence of the Court. The word "conviction" is undoubtedly verbum equivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the Court. In the passages cited from Blackstone's Commentaries, the term seems to be used in both senses. The question is, in which sense is it used in the statute now under consideration. And I cannot but think that the case of

Sutton v. Bishop is decisive of the point. The Court there said, "Though there is a distinction in criminal cases between the

[ \*504 ]

conviction and attainder, yet there is no such distinction in civil cases between verdict and judgment, so as that any effect can BOETEFEUR. follow from a naked verdict. In a civil action no penalty takes place till judgment be given on the verdict. The penalty is demanded as a debt, and is not due till judgment is given. Any other construction would open the door to frauds. An offender would prosecute another to verdict, and therefore secure his own indemnity, and then proceed no further." Why does not the same reasoning apply to this case? If a verdict of a jury or a confession by the party were sufficient to satisfy the statute a door would be equally open to fraud. So, again, the word "acquittal" is verbum aquivocum. It is generally said that a party is acquitted by the \*jury, but, in fact, the acquittal is by the judgment of the Court. A plea of auterfoits convict or auterfoits acquit can only be supported by proof of a judgment. Then, as these defendants were the overseers at the time that the judgment of the Court was pronounced, I think they are properly made defendants in this action.

BURGES

[ **\*5**05 ]

The next objection is, that the demand is not a proper one on the face of it; inasmuch as it does not specifically show that the defendants were overseers at the time of the conviction. that be so or not, I think the defendants are not now in a situation to raise this objection. It was not made at the trial, or when the rule nisi was moved for, and it would be unjust to allow it now. It is not necessary that the demand should be in writing; and if the objection had been taken at the trial, it might have been shown that an unobjectionable demand had been made by word of mouth, or it might have appeared, from the conduct of the parties, that the defendants had waived the defect in the written demand.

The third objection is, as to the demand not having been made upon the churchwardens, and their not having been joined as defendants in the action. It is unnecessary to determine whether churchwardens are to be considered as overseers for all purposes (1); because here, the Act of Parliament says, "in case such overseers shall neglect or refuse to pay upon demand, the said sum &c., such overseers, and each of them, shall forfeit to the person entitled to the same, double the sum so refused or neglected to be paid." This cannot mean that there is to be a separate penalty against each of the overseers; but it means that there may be a demand

<sup>(1)</sup> See Reg. v. Justices of Cambridgeshire, 7 Ad. & El, 480.

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made upon any of them, and that the penalty is to attach in ease of a refusal to make the payment \*so demanded. It is notorious that in some parishes, in which there are local Acts, there are several overseers; and it would be quite beside the purpose of the statute to hold it necessary to serve a notice of demand upon each of them; especially as it might often happen that some of them would be absent from the parish. As the statute, therefore, imposes the penalty on the overseers neglecting or refusing to pay, and upon each of them, the fair construction appears to me to be, that if the demand is made upon those against whom the action is afterwards brought, it is sufficient. If the reward had been paid by any of the parochial officers upon whom no demand was made, or who were not joined as defendants, that would have been an answer on the merits to the action. But that is not the case here. therefore, for these reasons, that the third ground of objection also fails. As to the last objection, which goes to a new trial being granted,

it has been urged that there was no evidence that the constable was the prosecutor of the indictment; and I agree that if there were none, there ought to be a new trial: but I am of opinion that there was some evidence at least upon the subject from which the jury might draw the conclusion they did. (His Lordship here recapitulated the leading facts given in evidence upon this point, ut supra, p. 742.) There was no evidence of collusion between the parties; and I cannot say that there was such an absence of all evidence to show that the constable was the prosecutor, as would justify us in sending down the case to another trial. said that such a case may be one of great hardship upon a parish; and undoubtedly a case may occur where wicked persons may combine for the purpose of obtaining the reward and putting the money in their own pockets without any benefit to the parish; but such a fraud would vitiate the whole proceedings, \*and would be a ground for a prosecution for conspiracy against the parties concerned in it. Such a case is not very likely to occur, as the parish officers may always exercise the option of taking the prosecution into their own hands. Upon the whole, I am of opinion that the

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## COLTMAN, J.:

rule must be discharged.

The first point in this case is, as to the meaning of the term "convicted" in the stat. 25 Geo. II. c. 36, s. 5. If that term is

satisfied by the mere verdict of a jury, or by the confession of the defendant, then the present action is brought against the wrong BOETEFEUR. But I agree that it must mean a conviction followed by a judgment; the object of the statute being that the nuisance complained of should be abated; and it is upon proving such a result that the inhabitants are to be entitled to the specified reward.

BURGESS

The second point is, that the demand is insufficient, as it does not show that the conviction took place in the time of the present defendants. No objection upon this point was taken at the trial; and it does not therefore come properly before the Court on the present occasion.

Upon the third point, namely, whether the demand should not have been made upon the churchwardens as well as the overseers, and the action also brought against them, I have felt some doubt and hesitation; but, upon consideration, I think this action may well be maintained against the present defendants. of Parliament says, "in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10l. to each of such inhabitants." It appears from this enactment that the duty of making the payment is put upon the whole body of overseers, possibly including the churchwardens. But that part of the enactment \*does not give rise to the present action. The statute goes on to say that, "in case such overseers shall neglect or refuse to pay upon demand the said sums of 10l., and 10l., such overseers, and each of them, shall forfeit, to the person entitled to the same, double the sum so refused or neglected to be paid." The right of action, therefore, vests on the demand being made; and I think it vests as against those parties only on whom the demand is made. The Act says that "each of them" shall be liable to the penalty; and I think it is not necessary to make the demand upon any parties but those against whom, in case of their refusal, it is intended to proceed. In that view a difficulty occurred to me as to whether the present action was not brought against more persons than ought to have been joined as defendants. It is clear, however, that not more than one sum is to be paid by way of penalty, and therefore all those upon whom the demand was made, may, I think, be joined as defendants.

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Upon the other point, the question was certainly open on the evidence, whether the prosecution was conducted by the constable [ \*509 ]

BURGESS or by the inhabitants; but that question was left to the jury; and BOETEFEUR, I see no reason to find fault with their verdict.

### CRESSWELL, J.:

I am entirely of the same opinion. The first point in the case is, whether the overseers who by the statute are made liable to pay the penalty, are the parties who are in office at the time that the judgment of the Court is pronounced against the offenders. Whether we look at the language of the particular statute, or at that of other analogous statutes, I think this is the plain meaning of the Legislature; though, in expressing it, they have used, as my Lord has remarked, the ambiguous word "convicted." The 101, reward is given to the inhabitants, not for taking any \*particular steps, but for conferring a benefit on the parish by putting down the nuisance of a disorderly house. They are not entitled to any reward for going before the magistrate, or for being bound over to produce evidence at the trial, or for giving that evidence, or even for procuring a verdict, which may be set aside, or whereon the judgment may be arrested. The reward is due only for that which will enable the parish to abate the nuisance; and, consequently, it is not to be paid till the conviction of the party by the judgment of the Court. Rewards are often offered for apprehending an offender and prosecuting him to conviction: but this is always taken to mean a prosecution to judgment (1).

Secondly; as to the objection to the form of the demand, I agree that it comes too late. Had it been made at the trial, a conversation between the parties might have been proved, showing a waiver, on the part of the defendants, of any informality in the demand, if any existed, or a knowledge, on their part, of what was meant by the term "conviction."

Upon the third point, I own I had some doubt during the argument; but I have none now, looking at the words in the latter part of the section under consideration. (His Lordship read the section.) Admitting that this enactment may include the churchwardens under the term "overseers," the duty of paying the reward is cast upon all of them; a performance of that duty by one, would clearly operate as a discharge to all. But if the money is not paid, a demand may be made upon any number of them; and

(1) So, formerly, when a witness was objected to on the score of his having been convicted of an infamous

crime, it was necessary to show the conviction by the production of judgment. See 1 Phill. Ev. 14, 16, 9th ed.

if they refuse, they are liable to an action. This action, therefore, is \*properly brought against those overseers upon whom the demand for the reward was made, and who refused to pay it.

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[ \*510 ]

As to the new trial, I think it impossible to say that the question ought not to have been left to the jury.

Rule discharged (1).

### LACKINGTON AND OTHERS v. ELLIOTT.

(7 Man. & G. 538—547; S. C. 8 Scott, N. R. 275; 13 L. J. C. P. 153; 8 Jur. 695.)

May 30. [ 538 ]

1844.

On the 29th of December, 1842, A. distrained for 120l., for rent due to him from B. at Michaelmas, the goods of B. being then in the possession of one C., to whom they had been conveyed by deed on the 13th of December, in trust for B.'s creditors. On the 3rd of January, 1843, it was agreed between A. and C. that the rent should be paid, A. consenting to forego the quarter's rent due at Christmas. The goods were accordingly appraised and condemned at 136l., being the amount of the rent and expenses, and that sum was handed over to A. On the 9th of January, a fiat issued against B., the act of bankruptcy being the execution of the deed: Held, that so much of the sum so paid to A., as exceeded a year's rent, was not money received to the use of the assignees.

Quære, whether a "distress" is a "transaction" within the 2 & 3 Vict. c. 29 [46 & 47 Vict. c. 52, s. 49]; and, if so, whether a notice of an act of bankruptcy given to the broker's man, would be sufficient to bind the landlord.

Assumpsit, for money had and received by the defendant, to the use of the plaintiffs as assignees of James May, a bankrupt. Plea, non assumpsit.

At the trial of the cause before Tindal, Ch. J., at the sittings in London after last Hilary Term, it appeared that in 1895, May became tenant to the defendant of a shop, &c. at Clapham, at the rent of 35l. payable quarterly. At Michaelmas, 1842, the arrears of rent amounted to 1201. On the 23rd of December, the defendant delivered a warrant to one Carter, authorizing him to distrain for that sum. Carter gave the warrant to one Taylor, who demanded the rent on the 29th, and was referred by May's wife to Chester, an attorney. Taylor accordingly applied to Chester, who informed him that May had executed a bill of sale of all his property to him, Chester, for the benefit of his creditors, but observed that it was useless to refer to him, as there had been no sale. thereupon returned to the premises and made the distress. At this time an auctioneer \*of the name of Price was already in possession making an inventory preparatory to a sale of the goods on behalf of

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[ \*540 ]

Lackington Chester, as trustee. The conveyance, on the 18th of December, 1842, empowered Chester to sell the property, and to apply the net proceeds rateably amongst May's creditors. Taylor remained in under the distress until the 3rd of January, 1843, when it was arranged that the defendant should retire and should abandon his right to distrain for the quarter due at Christmas, on being paid the 1201. and the costs of the distress. In pursuance of this arrangement the goods were appraised and condemned at 1361., which sum covered 120l. for the rent, and 16l. for expenses, and was paid by Price to Taylor, by whom it was handed over to the defendant's attornev.

On the 9th of January, 1843, a fiat issued against May, the act of bankruptcy relied on being the conveyance of the 13th of December, 1842.

For the defendant, it was insisted that the action was not maintainable, the money having been paid by Price for a good consideration, and there having been, in fact, no sale; and that, at all events, the transaction was within the protection of the 2 & 3 Vict. c. 29 (1), the notice to Taylor not being such a notice as would bind \*the defendant, and it not appearing to have been communicated to him by Taylor.

For the plaintiffs, it was contended that the defendant was precluded by the seventy-fourth section of the 6 Geo. IV. c. 16 (2), from availing himself of the distress beyond the amount of one year's rent, he having (by his agent Taylor) had notice that May had previously committed an act of bankruptcy; and consequently that they were entitled to recover the difference between one year's rent and the sum received by the defendant, as money received to their use.

A verdict was taken for the plaintiffs, damages 85l., leave being reserved to move to enter a nonsuit, if, under the circumstances, the action was not maintainable.

Channell, Serjt., in Easter Term last, moved accordingly:

The money having been paid by Price on a good consideration, viz. the withdrawal of the distress already made and an agreement to abstain from enforcing payment of the last quarter's rent by

<sup>(1)</sup> Repealed by 12 & 13 Vict. c. 106, s. 1. See now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 49).

<sup>(2)</sup> Repealed by 12 & 13 Vict. c. 106,

s. 1. See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 42), as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71, s. 28).-J. G. P.

a new distress (Williams v. Leper (1); Bampton v. Paulin (2)) cannot LACKINGTON be recovered back as money had and received to the use of the assignees. At all events, the defendant was within the protection of the 2 & 3 Vict. c. 29, the notice to Taylor of the act of bankruptcy not being notice to the landlord (Ramsay v. Eaton (3)), he not \*being the party immediately employed by him. The learned Serjeant submitted that the notice itself was not a sufficient notice in point of fact; as it should have been a distinct notice of circumstances distinctly amounting to an act of bankruptcy, and not a mere intimation of that which might or might not amount to an act of bankruptcy.

ELLIOTT.

[ \*541 ]

A rule nisi was granted on the first two points, but not upon the last; the Court observing that there had been a substantial notice to Taylor of facts implying that an act of bankruptcy had been committed by May-a notice of the execution by him of the deed which was afterwards given in evidence (4).

Byles, Serit. (with whom was W. H. Watson), now showed cause:

The landlord has, contrary to the express provisions of the statute, distrained for more than one year's rent, and has seized and sold property which by the act of bankruptcy had vested in the plaintiffs as May's assignees. The excess therefore is clearly money received to the use of the assignees, being the parties to whom the goods belonged. This is distinctly laid down by Lord HARDWICKE in Kitchen v. Campbell (5). Smith v. Jones (8) was decided upon the same principle.

The defendant cannot avail himself of the 2 & 3 Vict. c. 29, a distress not being within the protection intended to be afforded by that statute.

(TINDAL, Ch. J.: Does not "attachment" virtually include a distress? It is a holding of the goods in pledge.)

In Ex parte Styan (7), a deposit by way of pledge of a policy of assurance, was held to be a transaction or dealing within the statute; but in no case has the word "attachment" \*received so extended a construction. The Legislature may have thought the interests

[ \*542 ]

- (1) 3 Burr. 1886; 2 Wils. 308.
- (2) 4 Bing. 264; 12 Moore, 497.
- (3) 10 M. & W. 22.
- (4) See Ramsay v. Eaton, 10 M. & W. 22; Rothwell v. Timbrell, 1 Dowl.
- N. S. 778.
  - (5) 3 Wils. 304; 2 W. Bl, 827.
  - (6) 1 Dowl. N. S. 526.
  - (7) 2 Mont. Deacon & De Gex, 219.

LACKINGTON of the landlord were sufficiently protected. Assuming, however, that notice of the bankruptcy was necessary, the notice to the broker was sufficient notice to the landlord. Rothwell v. Timbrell (1) is in point. It was there held that an act of bankruptcy, committed by an assignment of all a trader's property for the benefit of his creditors, and communicated to the attorney of an execution creditor previously to the issuing of a fi. fa., will invalidate the execution as against the assignees, notwithstanding the 2 & 3 Vict. c. 29, although the fiat issued after delivery of the writ to the sheriff. In that case notice to the attorney was held to be sufficient; a fortiori,

(TINDAL, Ch. J.: The question is, whether there was a sale of the goods by the defendant, or whether the remedy of the assignees is not against the trustee who made the actual sale on the 9th of January.)

notice to the broker, who is the general agent for the purposes of the distress. In Ramsay v. Eaton (2), notice of an act of bankruptcy to a sheriff's officer in possession under a fi. fa., was held not to be notice to the execution creditor within the 2 & 3 Vict. c. 29; the sheriff being the officer of the Court, and not the agent of the execution creditor. That case is consistent with Rothwell v. Timbrell.

The transaction on the 3rd of January between Price and the defendant was a sale; and the subsequent dealing with the goods by Price on behalf of the trustee did not alter the transaction.

(CRESSWELL, J.: If the landlord had received the rent and expenses from the tenant, could it have been contended that that was a sale?)

That would be a very different case from the present.

(CRESSWELL, J.: There is another difficulty in treating this as a [\*543] sale. What money was paid for the \*goods?)

120l.

(CRESSWELL, J.: That sum was paid for the goods and the agreement by the landlord to abandon his right to distrain for the quarter's rent due at Christmas.)

That, it is submitted, can make no difference. The transaction was

(1) 1 Dowl. N. S. 778.

(2) 10 M. & W. 22.

treated, by both parties, as a sale under the distress. That, LACKINGTON however, is a question for the jury.

## Sir T. Wilde and Channell, Serjts., in support of the rule:

When it is left to the Court to say whether, upon the facts, a nonsuit ought to be entered, it is open to either party to contend that the facts should have been submitted to the jury. Here, the distress was on the 29th of December, the payment to the landlord on the 3rd of January, and the fiat issued on the 9th of that month. Had this been the case of a fi. fa. upon a judgment by nil dicit, the execution being perfected and the money paid, it would not have been affected by a subsequent flat. There is no substantial difference between the 74th and 108th sections of the 6 Geo. IV. c. 16: the former directs, that "no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, shall be available for more than one year's rent;" the latter, that "no creditor who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors." The relation to the act of bankruptcy being destroyed by the 2 & 3 Vict. c. 29, the payment made before the fiat, and without notice of an act of bankruptcy, cannot be disturbed. A distress comes within the term "attachment" in that statute, which was probably used in former Acts in the sense in which it is used in Comyns's Dig. tit. Process. It is within the scope of the statute, which was intended to embrace every transaction that could be affected by the ancient doctrine of relation. The Legislature never could have meant to give to \*themselves as landlords a less degree of protection than is afforded to other classes of creditors. The question then arises whether or not the defendant had notice of an act of bankruptcy having previously been committed by May. The broker's man was an agent employed to perform a certain duty; beyond that, he was intrusted with no discretion. The statute will be rendered nugatory if every messenger or subordinate, or servant, is considered an agent to receive notice. This case falls precisely within Ramsay v. Eaton.

But, in fact, there was in this case no sale at all. The landlord had a statutory power of sale in default of payment of the rent within the five days. Fearing that the exercise of this power might be prejudicial to the creditors, and desiring himself to have the conduct of the sale, the trustee bought off the landlord's claim,

[ \*544 ]

[ \*545 ]

ELLIOTT. including his right to distrain for the Christmas rent. There was no change of property, and no title acquired by the trustee under the landlord: Lee v. Lopes (1).

The money having been paid, cannot be recovered back: Long-ridge v. Dorville (2), Stracy v. The Bank of England (3). The assignees have no power to interfere with a contract to which they were not parties.

The first question raised at the trial, viz. whether the money was

# TINDAL, Ch. J.:

the produce of the sale of goods, the property of the assignees, appears to me to dispose of this case. If the landlord has sold the goods of the assignees, they may waive the tort, and sue for money had and received. But it was not shown that any sale took place. The landlord, when he distrained on the 29th of December, had a mere right to detain the goods as a pledge, and to sell them at the expiration of five days, in case the rent should be then unpaid. \*Before the expiration of the five days, it was arranged between the trustee under the deed of assignment and the landlord's agent, that the trustee should buy the landlord out by paying the amount distrained for. The goods remained upon the premises, and the trustee's servant was in possession at the time of the distress, and so continued. There was therefore no change of possession or of property; the landlord withdrew and the goods remained in the hands of the trustee. Nothing in the transaction bore the aspect of a sale. No public notice was given, and there was no sale by public auction. The landlord could not by law have so disposed of the distress. This shows that the transaction differed from an ordinary sale by a landlord in satisfaction of a claim for rent. Another circumstance proves conclusively to my mind that this was not a sale, but a mere buying out of the landlord. The distress was taken on the 29th of December, for rent due up to the preceding The landlord had at that time a right to distrain for Michaelmas. another quarter's rent. One part of the arrangement which he came to with the trustee was, that he should forego the quarter's rent due at Christmas. This would be sufficient to satisfy me that the money now sought to be recovered, was not produced by any sale of the property of the assignees. If it be asked, whose money was received by the defendant, the answer is that it may have been

<sup>(1) 15</sup> East, 230.

<sup>(2) 5</sup> B. & Ald. 117.

<sup>(3) 6</sup> Bing. 754; 4 Moo. & P. 639. Vide 3 Man. & G. 731.

the money of Price, the auctioneer, who, to answer some purposes LACKINGTON of his own, volunteered to make the payment; or the payment may have been made by Price as the agent of the trustee, who thought it desirable that the goods should be sold by himself rather than by the landlord, and did not then contemplate the bankruptcy of May. But there appears to be nothing to warrant the conclusion that it was money had and received to the use of the assignees: \*and therefore I think the rule for entering a nonsuit should be made absolute.

ELLIOTT.

「\*546 ]

### COLTMAN. J.:

I am of the same opinion. Whatever appearance of a sale the transaction may have at first sight, upon a closer investigation it turns out to have been a mere bargain to get rid of the landlord's claim: it has none of the regular and usual incidents of a sale. The goods had been distrained upon by the landlord; and, by arrangement between him and Price, the agent of the trustee, they were to be appraised and condemned at the precise amount of the rent and expenses, which tends to show that no sale was contemplated (1). The condemnation (as it is called) was a mere settlement between the parties, and not a sale. The landlord wanted his rent: and Price was anxious, on the part of the trustee, to discharge the goods from the landlord's claim. If my brother Byles had not at the trial assented to the reservation of leave to move to enter a nonsuit if the Court should be against him upon this point, all we could have done would have been to grant a new trial. But the whole case was left to the Court to be decided upon an agreed state I am of opinion that there was no sale of these goods; of facts. and I think it would be dangerous to hold that the delivery of goods distrained upon, to the owner on the premises, amounted to a sale under the distress. The rule for entering a nonsuit must be made absolute.

# CRESSWELL, J.:

I am of the same opinion. By consent of the parties, it is left to the Court to say whether or \*not there was a sale of these goods. The words "sale and purchase" do not appear to me to have been used in their ordinary and proper sense in the discussion of this

[ \*547 ]

(1) In replevin, where goods are taken beyond the amount of the rent, the jury commonly find the goods to be of the precise value for which the

distress was taken. But this causes no inconvenience; for as the avowant's judgment is for the sum found, the excess of value is immaterial.

LACKINGTON case.

7.
ELLIOTT. ment

The whole transaction seems to have been a mere arrangement to dispose of the landlord's claim. When the distress was taken on the 29th of December, the goods were in the possession of the trustee under the deed of assignment, and were about to be The distress gave the landlord no property in the goods, but a mere lien, with a right to sell provided the rent were not paid within the five days. The arrangement could not have been intended to be, that the landlord should sell to the trustee, and that the trustee should buy that which was already his property, though subject to the limited right of the landlord before mentioned. The payment was made for the purpose of redeeming the goods from the landlord's claim in respect of the distress already made, and to get rid of his right to distrain for the further rent due at Christmas. The only ground upon which the plaintiffs can maintain this action, is that the defendant has sold goods belonging to them, and has received the proceeds. But there was no sale in the sense that would make the proceeds money had and received to the use of the The fact of a sale failing, the plaintiffs' right of action fails also. It is unnecessary to give any opinion on the point raised respecting the operation of the 6 Geo. IV. c. 16, s. 74, and the 2 & 3 Vict. c. 29 (1).

Rule absolute for entering a nonsuit.

1844. June 3.

[5<del>1</del>8]

PETERS AND ANOTHER r. CLARSON AND ANOTHER.

(7 Man. & G. 548—558; S. C. 8 Scott, N. R. 384; 13 L. J. M. C. 153; 8 Jur. 648.)

By s. 67 of the Highway Act, 1835, surveyors are empowered to make drains on lands adjoining any highway upon paying the owner for the damages sustained thereby, to be settled and paid for as the damages for getting materials in inclosed lands are therein directed to be settled and paid. The power of getting materials is given by the Act (sec. 54)—the said surveyor making such satisfaction for the materials, and also for

paid. The power of getting materials is given by the Act (sec. 54)—
the said surveyor making such satisfaction for the materials, and also for
the damage done to such lands as shall be settled and ascertained by order
of the justices at a Special Session for the highways.

Held, that tender of satisfaction for damage done in making a drain, was not a condition precedent to the right of entry on the land:

Held, also, that the amount of satisfaction could only be ascertained by the justices at a Special Session.

Trespass quare clausum fregit.

Pleas, first, Not guilty (by statute). Secondly, entry to cleanse out a ditch adjoining a public highway, which the plaintiffs had wrongfully stopped up.

<sup>(1)</sup> See note (2), p. 750.

The plaintiffs, admitting the existence of the highway, replied de injuria, absque residuo causa.

PETERS 9.
CLARSON.
[ 549 ]
[ \*550 ]

At the trial before Tindal, Ch. J., at the last Spring \*Assizes for the county of Warwick, the following facts appeared. The defendants, who were way-wardens (appointed under the 5 & 6 Will. IV. c. 50) for the parish of Garmouth in that county, on the 24th of March, 1843, entered a close belonging to the plaintiffs, adjoining the highway, and opened a drain for carrying off water from the road, which had been closed up by the plaintiffs. On the 8th of April following, notice of action was given, and the present action was commenced on the 9th of May, up to which time no tender of satisfaction or amends had been made on behalf of the defendants, nor had any proceedings been taken by them to ascertain the amount of damage done to the plaintiffs' land. \*It was not shown that any Special Session had been held between the day of the entry and the commencement of the action.

[ \*551 ]

It was contended on the part of the plaintiffs, that under the 67th section of the Act, it was the duty of the defendants to ascertain the amount payable to the plaintiffs by way of compensation, and to tender the same before they entered upon the land; or that, at any rate, under that section and the 54th, they ought themselves to have brought the matter before the Special Sessions, so that the amount of compensation might have been there ascertained; and that not having done either, they were trespassers ab initio. The defendants admitted that a verdict must pass against them upon the second issue, and the Lord Chief Justice directed the jury to find a verdict for the defendants upon the first issue, reserving leave to the plaintiffs to move to enter a verdict for themselves on that issue, with 40s. damages, if the Court should be of opinion that the defendants were not protected by the statute.

Channell, Serjt., in last Easter Term, moved accordingly, citing the following cases: Boyfield v. Porter (1); Paddock v. Forrester (2).

April 16.

(TINDAL, Ch. J. referred to The Six Carpenters' case (3), and CRESSWELL, J. to Lister v. Lobley (4).)

A rule nisi being granted,

(4) 7 Ad. & El. 124.

<sup>(1) 12</sup> R. R. 334 (13 East, 200).

<sup>(3) 8</sup> Co. Rep. 146 a.

<sup>(2) 3</sup> Man. & G. 903; 3 Scott. N. R. 715.

PETERS | r. CLARSON. Adams, Serjt. (with whom was G. Hayes), now showed cause. \* \* \*

[ 553 ] Manning, Serjt. (with whom was Mellor) showed cause. \* \* \*

## [ 555 ] TINDAL, Ch. J.:

It appears to me that the 67th section of the general Highway Act does not make the ascertaining of the damages, or the payment or tender thereof, a condition precedent to the right of entry upon the land taken under the authority of the Act. The object of the defendants in entering upon the plaintiffs' land was, to make a drain to carry off the water from the adjoining highway. the 67th section, the way-wardens have authority to make drains &c. in any lands adjoining, "upon paying the owner or occupier of such lands or grounds for the damages which he shall sustain thereby." It would be most favourable for the plaintiffs to stop at this point: for, looking at the words "upon paying for the damages," it might be said that the entry on the land and the payment of satisfaction were to be concurrent acts. But, as it is obviously impossible to pay for an unknown quantity of damage, if there had been no reference to the 54th section. I should have thought the condition not precedent, but subsequent, and that the amount must therefore be something to be afterwards ascertained. But the section does not \*stop there; for it goes on to say, that

[\*556] But the section does not \*stop there; for it goes on to say, that "the damages are to be settled and paid in such manner as the damages for getting materials in inclosed lands or grounds are directed to be settled and paid." This refers us back therefore to the 54th section, which prescribes the manner in which such last-mentioned damages are to be settled and paid for. That section gives authority to the way-warden to enter upon certain lands and take materials for the highway, "the said surveyor making such satisfaction for the materials which may be got or taken away, and

and carrying away the same, as shall be settled and ascertained by order of the justices at a Special Sessions for the highways." I cannot see any material distinction between the expression "upon paying" in the 67th section, and "making such satisfaction" in the 54th. The case of Boufield v. Porter is an authority to show,

also for the damage done to such lands or grounds by the getting

that after taking the materials from the land, the determination of the amount of the damage is left to the Sessions. That case was decided upon the former Highway Act, the 18 Geo. III. c. 78. Is there any substantial distinction between the provisions of that Act and those of the present Act? I think there is not. section of the former Act, the surveyor or way-warden was authorised to enter upon inclosed lands, and to carry away materials for the highways: "the said surveyor making such satisfaction for the damage to be done to such lands by the getting and carrying away the same, as shall be agreed upon between him and the owners. &c., and, in case they cannot agree, then such satisfaction and recompense shall be settled and ascertained by order of one or more justice or justices of the peace," &c. Except, therefore, for the interposition of the power of immediate agreement between the parties, in the 13 Geo. III. c. 78, the mode of ascertaining the amount of damage appears to be the same in both Acts. \*And we must, in this case, follow the decision in Boyfield v. Porter, namely, that the amount of the damage must be fixed, not by a jury, but by the magistrates in Special Session.

PETERS v. CLARSON.

[ \*557 ]

It has been said indeed, that even if the making or tendering of compensation is a condition subsequent, still there was a duty on the way-wardens to ascertain the amount. But no time is limited by the Act for their doing so. The notice of action given by the plaintiffs (1), will not have the effect of limiting the period. There is nothing to prevent them from ascertaining it now.

### COLTMAN. J.:

I am of the same opinion. The words in the old Highway Act are, "the said surveyor making such satisfaction, &c. as shall be agreed upon;" and then if the parties cannot agree "such satisfaction &c. shall be settled and ascertained" by the justices. The words in the present Act, "upon paying the owner &c. for the damages" in the manner pointed out by a former section, where the words are "the said surveyor making such satisfaction &c. as shall be settled and ascertained by the justices," are rather more like a condition; but I think, upon the old decisions, that they do not amount to a condition precedent. It has been argued that even if the making satisfaction to the party is a condition subsequent, still it was the duty of the way-wardens to go before the magistrates, and to make a tender, before action brought. The provisions of the 109th section are relied upon in support of that proposition; and it is contended that, under that section, a way-warden must

<sup>(1)</sup> Notice of action given under the Public Authorities Protection Act, s. 109 of the Act, now repealed; see 1893 (56 & 57 Vict. c. 61).—J. G. P.

PETERS ©. CLARSON.

[ \*558 ]

tender satisfaction, and therefore that he is bound to ascertain the amount of damage, before the commencement of the action. Where a way-warden has not pursued the Act of Parliament, it may be necessary that he should make such a tender of amends; but I think that where he has conformed to \*the Act, it is not necessary that he should go before the justices at a Special Session in order to ascertain the amount of damage done. If it were so, it would involve this absurdity, that if no Session were held between the time when the Act complained of was done, and the commencement of the action, it would be impossible to ascertain the amount of damage; and it would be manifestly absurd to hold that a party was bound to take a course which he might not be able to adopt.

CRESSWELL, J. concurred.

Rule discharged.

1844. June 3.

# SURPLICE v. FARNSWORTH AND ANOTHER.

(7 Man. & G. 576-586; S. C. 8 Scott, N. B. 307; 13 L. J. C. P. 215; 8 Jur. 760.)

[ 576 ]

In an agreement for a tenancy of buildings for a term, the landlord to do the repairs, there is no implied condition that the tenant may quit if the repairs are not done (1).

Assumpsit, for use and occupation. Plea, non assumpsit.

At the trial, before Gurney, B., at the last Assizes for the county of Nottingham, the following facts appeared:

The defendants were yearly tenants to the plaintiff of certain malt-offices, at the rent of 25l., payable half-yearly. They entered into possession at Michaelmas, 1838. In March, 1843, they quitted the premises, upon the ground that they were not in a fit state of repair for the purposes of malting, and they tendered the keys to the plaintiff's agent, who refused to receive them. On one occasion during the tenancy the defendants did some repairs to the premises, and deducted the amount from the rent.

The learned Judge directed the jury to find a verdict for the plaintiff; but he also desired them to state whether, in their opinion, the premises were in a fit state for the purposes of malting at the time they were given up. The jury having found that the premises were not in a fit state for the purposes of malting, the verdict was entered for the plaintiff, leave being reserved to the defendants to move to set it aside and enter a verdict for themselves.

<sup>(1)</sup> Cited in Johnstone v. Milling (1886) 16 Q. B. Div. 460, 474, 55 L. J. Q. B. 162.

Byles, Serjt., in last Term, obtained a rule nisi for this purpose, upon the authority of Edwards v. Etherington (1), Collins v. Barrow (2), Salisbury v. Marshal (3), and Smith v. Marrable (4). also mentioned Sutton v. Temple (5) and Hart v. Windsor (6).

SURPLICE FARNS-WORTH.

Clarke, Serjt. now showed cause:

[ 577 ]

The question in this case is, whether use and occupation will lie in respect of premises which are out of repair, or whether a tenant is entitled to give up possession upon that ground. There was no stipulation here that the landlord should repair; nor does it appear that he was, in fact, called upon to repair, though the tenants were. on one occasion, allowed to deduct the amount of some repairs, done by them, from the rent. The case of Edwards v. Hetherington was decided without argument, the rule for a new trial having been refused.

(TINDAL, Ch. J.: It might be said that the facts in that case amounted to a quasi eviction.)

[He discussed the cases above cited.] Even if there were an implied contract to repair by the landlord, the breach of that engagement would not entitle the tenant to determine the tenancy. This is not like the case of a surrender, as in Whitehead v. Clifford (7).

[ 578 ]

Byles, Serjt., in support of the rule:

The form of the present action is material. It is for the use and occupation of the premises, not debt upon a demise. The question is, whether, under all the circumstances, the defendants had such an use and occupation as will sustain the action, the premises being shown to be in such a state as to render them unfit for the purposes for which they were taken, and the landlord being bound to repair them. It was shown that the repairs had previously been done at his expense.

(CRESSWELL, J.: Only on one occasion. There may have been other repairs. And the circumstances under which the landlord allowed the repairs to be deducted from the rent on that occasion, do not appear.

- (1) Ry. & M. 268; 7 Dowl. & Ry. 11 M. & W. 5). 117.
  - (2) 1 Moo. & Rob. 112.

(5) 12 M. & W. 52.

(3) 4 Car. & P. 65.

- (6) 1b. 68.
- (4) 63 R. R. 493 (Car. & M. 479;
- (7) 15 R. R. 579 (5 Taunt. 518).

SURPLICE v. FARNS-WORTH.

F \*579 T

[ \*581, n. ]

TINDAL, Ch. J.: Suppose, the landlord were bound to repair, what then?)

In that case there would be an implied condition, at all events, in an action for use and occupation, that if the premises were not repaired, the tenant might give up possession. In Salisbury v. Marshal there was an understanding between the parties that the premises should be put into proper repair, it is to be presumed, by the landlord.

(CRESSWELL, J.: That was before the tenant went in.)

He did enter however, and his complaint was that the landlord did not continue to repair.

(Tindal, Ch. J.: What I said in that case was, that if there had been a separate agreement to do the repairs, then the not having done them would furnish no defence to the \*action. But I thought the agreement formed a condition precedent.)

[He discussed the cases cited above and referred to Covie v. Goodwin (1).]

[580] (CRESSWELL, J.: There are some authorities referred to by [\*581] PARKE, B. in *Hart* v. *Windsor* from Brooke's Abridgment (2), \*to

(1) 9 Car. & P. 378.

(2) Tit. Dette, pl. 18 and 72; 12 M. & W. 84. The authorities had been cited by Jos. Addison in the argument. Bro. Abr. tit. Dette, pl. 18, refers to 27 Hen. VI. 10, where the case is thus reported, "In a plaint for debt at Guildhall, London, upon the lease of a house, the defendant said that the action he ought not to have, because he said that the custom of London was this. that the lessor ought sufficiently to repair that which he demises, during the lease, and so had been from time whereof, &c.; and he says that the house, by tempest of water and wind, a long time before the rent was in arrear, was uncovered and had become so ruinous that he could not dwell in his house or take any profits of the house, and a long \*time before the rent was payable he required the plaintiff to repair the house and he refused, wherefore he waived the house before

the day that the rent was payable, because he could not dwell therein.

Verification and prayer of judgment. To which plea the plaintiff demurred.

Wangford, Serjt.:

If the plaintiff had ejected the defendant before the day of payment. that would have been a good plea; so here, inasmuch as the house is not repaired he cannot dwell therein. which is the act and default of the plaintiff; and if the rent had been reserved in this form, that he the plaintiff should sufficiently repair the house during the term, and that then he the defendant should pay annually so much, in this case it would have been a good plea to have said that the house was ruinous, and that he had not repaired the house according to the lease, and had demanded judgment of action; this would have been a good plea; so here. To which it was answered, that this latter case was not like the former case, because there the rent was reserved upon condition which ought to be performed before he

show that even where the lessor is bound to repair and does not, the tenant cannot quit.)

SUBPLICE c. FARNS-WORTH

should pay any thing, but the first case is not conditional but a covenant. upon which, by the custom, he might have an action of covenant, if it was made by indenture. And the case of the ouster is not like this case, for when the lessor ousts the lessee, the lessor is himself seised, but if the lessee renounces his tenancy, the lessor is not thereby in possession, but the lessee is still possessed; and if the lessor chooses to enter, the lessee shall have a good action against him, and so it is not like. And, Sir, notwithstanding the lessee may have an action of covenant against the lessor, and so recover his damages, that shall not deprive (ne extortera) the plaintiff of his action, for a covenant shall not oust (ne extortera) another action, but a thing done by a man shall oust (extortera) the same man from another action, as in a writ of waste, if the plaintiff himself did the waste, and so is the diversity. And so the opinion of the Court was that the plaintiff should recover. And therefore the parties agreed, &c." (T. 27 Hen. VI. fo. 10, pl. 6). Bro. Abr. tit. Dette, pl. 72, refers to 14 Hen, IV, 27, where the case is thus reported. "In a writ of debt the plaintiff counted that he demised to the defendant certain land for a term of years, rendering certain rent at certain terms, and showed how the rent was in arrear, &c., and often had he prayed him to pay, &c.

### Chein, Serjt. :

The plaintiff demised the land, as he has said, by this deed, which is here, rendering to him the said rent; and by the deed he is bound to repair the houses at the beginning of the term; and after they are sufficiently repaired, we \*are to sustain them at our cost until the end of the term, &c. Whereupon at the beginning of the term there were certain houses which were uncovered and not repaired; whereupon he commanded us to amend those houses which were uncovered and not

repaired; whereupon he commanded us to repair those houses with the rent, and we did it, and expended the same rent in the cost of the repair of the same houses, and more; wherefore we do not intend that action he ought to have.

#### HILL, J.:

You have shown that the rent is reserved by a deed, and have acknowledged the duty; wherefore now to say that you have put the same rent upon the cost of the houses by his command, and of that you show nothing (produce no deed), I cannot see how you can be allowed to say that. But rien arrere, or levied by distress, you may well say, notwithstanding the specialty.

#### Chein:

He has counted upon a lease without deed, wherefore we will not show a deed.

### HILL:

Still it is all one if you acknowledge the duty, although the lease was without deed.

#### HANKFORD, J. to Chein:

If I lend you certain money and afterwards bring a writ of debt against you, will it be a plea for you to say that you have paid another person the same money by my command, without showing any thing of it; quasi diceret non; wherefore no more so here.

Chein durst not demur, but said he would imparl, &c." (H. 14 Hen. IV. fo. 27, pl. 35. And see Stafford v. Cantlow, M. 34 Hen. VI. fo. 17, pl. 32.)

But in T. 11 Ric. II. Fitz. Abr. tit. Barre, pl. 242, is the following case: "Debt upon a lease for a term of years.

### Pynchebek, Serjt.:

The defendant demised to us the said land by the deed which here is; and by the same deed he granted to us that we should repair the same lands when they should be ruinous, at the cost of [ \*582, m. ]

SUBPLICE FARNS-WORTH.

Those cases were before the action for use and occupation was given by statute.

582 ]

f \*583 T

(COLTMAN, J.: Do you admit that debt on the demise would still For if so, the tenancy must be still continuing.)

Hart v. Windsor would seem to show that. But in debt on demise the defendant might plead in confession of the demise and avoidance thereof by showing the non-repair by the landlord. assumpsit for use and occupation, the whole question is at large under non \*assumpsit. In 1 Roll. Abr. tit. Apportionment (C) (1) it is said, "if a man lease land for life or years, rendering rent, and afterwards part of the land becomes covered with fresh water, this will not make an apportionment of the rent, because the soil remains, and the lessee alone shall have the fish in the water, and he may, by ordinary intendment, regain the land. man lease for life or years, rendering rent, and part of the land becomes covered by the sea, this will make an apportionment of the rent, because, though the soil remains to them, yet the water is part of the sea, and so is common to any man to fish there as well as to the lessee, and there is no possibility, by ordinary intendment, to regain it" (2). So that a distinction is made between an overflow by the sea or by fresh water; the former case being considered equivalent to an eviction. Here, there is no impossibility to perform the contract on the part of the landlord. If it had been agreed that the term should continue, the plaintiff would certainly have been entitled to recover for the value of the premises. Would use and occupation lie for a house which had been burnt down, or for an apartment in a house that had been burnt, where nothing was left for the tenant to occupy?

(TINDAL, Ch. J.: In such a case there might be a distinction the plaintiff; and he said that they were ruinous, and showed how, and that he repaired the said houses and land with the same rent. Judgment, if action.

#### Markham, Serjt.:

The deed does not provide that he shall repair the houses and land with the rent; wherefore judgment, and we pray our debt, &c.

#### BELKNAP, Ch. J.:

He has said that the house was

ruinous and feeble; wherefore answer.

#### Markham:

He has expended in repairs only 20s., and we pray our debt of the remainder."

- (1) Pl. 1 and 2, translated 3 Vin. Abr. 14, same title.
- (2) Dyer, 56 a (Richards, le Taverner's case) is referred to. But the former point is not there mentioned. And upon the latter there was a division of opinion. See also Bac. Abr. tit. Rent (M.), 2.

whether or not the burning was by the act of God (1). Have you considered the case of *Izon* v. *Gorton*? (2). It seems very strong against you upon the latter point. The defendants there, as tenants from year to year, occupied a second floor, \*which, during their occupation, was consumed by an accidental fire; and it was held that notwithstanding the destruction of the premises, they were liable to an action for use and occupation for the period which elapsed between the fire and the regular determination of the tenancy.)

SURPLICE t. FARNS-WORTH.

[ \*584 ]

Did it appear there that the parties had gone out of possession?

(Tindal, Ch. J.: As much so as people usually do when their houses are burnt down.

CRESSWELL, J.: And even more so, for being only tenants of an upper floor, they had not even the land.)

That case appears to be at variance with Edwards v. Hetherington. Here, at any rate the tenants were anxious, and offered to give up possession.

## TINDAL, Ch. J.:

It seems to be admitted that this rule cannot be sustained, unless it is shown that the ground upon which it was obtained can be supported; namely, that if the landlord is bound to repair the premises during the tenancy, there is an implied condition that should he fail in the performance of his contract, the tenant may throw up the tenancy. No authority has been cited to show that such a contract to repair implies such a condition. If the contract were under seal, the condition that the tenant upon the breach thereof might determine the tenancy, could not be implied. Where it is intended that a covenant shall operate as a condition, there is always an express covenant to that effect; as in the case of re-entry by the lessor for breach of covenant by the lessee. not aware of any legal principle, that an agreement by parol is in this respect to be construed differently from one under seal. Assuming, therefore, that there was an agreement in this case by the landlord to repair—though none was actually proved—there

<sup>(1)</sup> See Richards, le Taverner's case, ut supra, Rol. Abr. and Vin. Abr. tit. Apportionment (C.) pl. 3; Bac. Abr. tit. Rent (M.), 2. But see Dyer, 33 a,

pl. 11.

<sup>(2) 50</sup> R. R. 772 (5 Bing. N. C. 501; 7 Scott, 537).

SURPLICE v. FARNS-WORTH. [ \*585 ] is no principle of law to authorise the importing of the condition contended for. In such a case the tenant will have his remedy over against his landlord; \*but the relation of landlord and tenant still subsists between them. In Salisbury v. Marshal there was something to be done by the landlord before the tenant entered. That looks more like a condition, and if it was not performed then the whole matter would fall to the ground. And though the tenant there entered into possession, it was upon the assumption that the landlord would go on with the repairs; but the latter failed to do so, and did not perform what he had agreed to do in order to enable the tenant to enter. After the case of Izon v. Gorton it seems impossible to hold, in this case, that the tenancy did not continue.

### COLTMAN, J.:

I am of the same opinion. Some of the cases, such as Salisbury v. Marshal, and Edwards v. Hetherington, may, I think, be distinguished from the present. In the case of Cowie v. Goodwin, the nuisance was actually prejudicial to health. But if not distinguishable, they seem to be overruled by Hart v. Windsor; to which I fully adhere. I think that the circumstance of a landlord being bound to repair, does not entitle the tenant to quit upon the failure of the landlord to perform his contract. It is said that Hart v. Windsor is distinguishable from the present case, inasmuch as it was an action on a demise, and this is for use and occupation; but I do not think there is any thing in the distinction. If debt upon a demise lies, the tenancy still continues; so, in use and occupation, although there may be no actual occupation, there must be what, in law, amounts to a holding.

## CRESSWELL, J. :

It seems to me also that the rule must be discharged. This is an action for use and occupation, founded upon an agreement to hold for a term not yet expired. It is said that this agreement was put an end to by the non-performance of an implied \*condition on the part of the landlord to repair the premises. It seems to be admitted that no condition could be implied if the contract were written or under seal. And there is not more reason—there is even less—to import such a condition into the present contract (1).

(1) Where a landlord is bound to repair in certain cases, and the tenant in one of those cases, from a sudden

accident, is obliged to make those repairs to prevent further mischief, if an action be brought against the tenant

\*586

# JENKYNS v. USBORNE (1).

1844.

June 7, 29.

[ 678 ]

(7 Man. & G. 678—701; S. C. & Scott, N. R. 505; 13 L. J. C. P. 196; 8 Jur. 1139.)

A., of London, had ordered beans of B. and C., of Leghorn, through D., their agent. B. and C. shipped more than the quantity ordered, and drew two bills upon A., one for the quantity ordered, and the other for the residue: and they transmitted those bills to A. through D., with a letter of advice and an indorsed bill of lading for the whole cargo. The beans were shipped in 3,932 sacks. A. accepted the bill for the beans ordered, but declined to take the residue (amounting to 1,442} sacks), or to accept the bill drawn against them. D. consented to take the residue of the beans, and A. thereupon wrote a letter to him, acknowledging such residue to be his, and inclosed an order to the captain to deliver to the bearer the 1,442 sacks. D. thereupon handed over the bill of lading to A. D. accepted the bill drawn against the residue of the cargo, and paid it at maturity. Before the arrival of the ship D. sold the residue to E., who accepted a bill for the amount, drawn by B., who happened to be in London, and D. handed to E. A.'s letter and delivery-order. E. afterwards applied to F. for an advance of cash, and handed him over as a security (inter alia) the letter and delivery-order; and F. gave his acceptance to E. for the amount of cash required; which acceptance was honoured at maturity. Before E.'s acceptance became due, and before the arrival of the ship, E. stopped payment. When the ship arrived, the portion of the cargo for which A. had accepted the bill was delivered to him.

Held, that D. might exercise the right of stoppage in transitu as to the residue.

Held, also, that the delivery-order given by A. was not equivalent to a bill of lading.

This was an action of trover for a quantity of beans and sacks, of the alleged value of 700l. The defendant pleaded, first, Not guilty; secondly, that the \*plaintiff was not possessed of the goods mentioned in the declaration.

[ \*679 ]

The cause was tried at Guildhall, at the sittings after Trinity Term, 1842, before the Lord Chief Justice, when a verdict was found for the plaintiff for 700l. damages, subject to the following case:

The beans mentioned in the declaration were part of a cargo of beans in sacks, shipped by John and Thomas Lloyd, of Leghorn, in May, 1841, to Hunter and Coventry, merchants in London, per the ship Agnes, Captain Turcan, in consequence of an order, previously given by the latter to the former, through the plaintiff. The shippers transmitted to Messrs. Hunter and Coventry, through the plaintiff, a letter of advice, with a bill of lading for the whole cargo,

for the rent, a court of equity will not interpose; because the tenant, if entitled to charge the landlord with the repairs, may set-off in the action the money advanced by him for the repairs, as money paid to the use of the landlord: Waters v. Weigall, 2 Anst. 575.

(1) Cited by BLACKBURN, J., Cole v. North-Western Bank (1875) L. R. 10 C. P. 354, 373; and see M'Ewan v. Smith (1849) 2 H. L. C. 309.

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to the order of the shippers, and indorsed "John and Thomas Lloyd," and an invoice, and also two bills of exchange, both of them bearing date at Leghorn, on the 7th of May, 1841, and drawn by the shippers upon Hunter and Coventry at three months; the one for 5891. 9s. 1d., and the other for 3171. 14s. 6d., payable to the order of the drawers, and both specially indorsed by the payees to John Lloyd & Co., of Manchester, which last mentioned firm consisted of the same \*individuals as the firm of John and Thomas Lloyd, of Leghorn.

The following is a copy of the above-mentioned letter of advice:

"LEGHORN, 8th May, 1841.

"Gentlemen,—With reference to our communications through our mutual friend Mr. Jenkyns, we have this pleasure to wait on you with invoice, bill of lading, and copy of charter-party, for a cargo of beans, on your account, per Agnes, Captain Turcan, sailing to-morrow morning; and the same amounts to 857l. 3s. 7d. sterling, which we have valued on you in two points, 539l. 9s. 1d. sterling, and 317l. 14s. 6d. sterling, at three months' date, to our order. The quality of these beans has turned out very good, and clearer than the generality of shipments.

(Signed) "John and Thomas Lloyd."

The bills were drawn for the price of the shipment. The shipment exceeded the order of Hunter and Coventry, by the amount of the smaller bill. Soon after the arrival of the letter of advice, bill of lading, invoice, and bills of exchange, in London, the plaintiff, who was the agent in London of the shippers, called upon Hunter and Coventry for their acceptance of the above bills. On that occasion Hunter and Coventry accepted the bill for 539l. 9s. 1d., which covered the price of the beans ordered by them, but declined to take the remainder of the cargo, and refused to accept the smaller bill; whereupon an arrangement was come to which is explained by a letter, of which the following is a copy:

"Mr. Jenkyns, "London, 24th May, 1841.

"Sir,—The invoice per Agnes, Turcan, master, from Leghorn, states 3,932 sacks of beans, equal to (supposed) 983 quarters; the amount sterling for which bills have been drawn is 857l. 3s. 7d. As you have \*withdrawn from this amount 317l. 14s. 6d., we hereby acknowledge such a proportion of the said cargo of beans per Agnes, according to the said sum of 317l. 14s. 6d., the which you have accepted,

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to be yours, and herewith hand you an order to receive the same; and, should there be a difference in the calculating the sacks as per invoice, then you must bear such proportion.

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(Signed) "HUNTER and COVENTRY."

The order referred to in the letter was inclosed therein; and the following is a copy thereof:

- "Captain Turcan of the Agnes.
- "Sir,—Please deliver to the bearer one thousand four hundred and forty-two three-fourths  $(1,442\frac{3}{4})$  sacks of beans ex Agnes.

(Signed)

"HUNTER and COVENTRY."

The plaintiff accordingly, in pursuance of the said arrangement, accepted the smaller bill, namely, on or about the said 24th day of May, and paid it at maturity to John Lloyd & Co.; whereupon the following receipt was indersed on the back of the bill by Thomas Lewis, per procuration of John Lloyd & Co., of Manchester, namely, "Received from Mr. Jenkyns, London, the amount of this bill in cash, on account of Messrs. Jno. and Thos. Lloyd, per pro. Jno. Lloyd & Co., Thos. Lewis."

The plaintiff, at the time the said arrangement was come to, handed over the bill of lading to Hunter and Coventry.

The plaintiff afterwards, and about six weeks before the arrival of the vessel in the port of London, sold the beans to J. W. Thomas for the price of 317l. 14s. 6d., for which Thomas accepted a bill to that amount, payable at the same time as the two former bills.

The bill was sent to Thomas for acceptance, inclosed in a letter, of which the following is a copy:

"London, May, 1841.

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"Mr. Thomas,—In forwarding the inclosed for acceptance, I beg to hold you harmless of damage to your beans per Agnes. The quantity, as shown per bill you accept, I promise to deliver you free of damage.

(Signed)

"F. JENKYNS."

The bill inclosed was drawn by John Lloyd, one of the Leghorn firm, who was generally resident at Leghorn, but who happened at the time to be in London, by the style and firm of John Lloyd & Co. The bill was made payable to the order of that firm, and was, at the time it was so sent for acceptance, indorsed specially to

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**\*683** ]

the plaintiff by the said John Lloyd, under the said style of John Lloyd & Co.

On the 25th of May, the plaintiff forwarded to J. W. Thomas, Hunter and Coventry's said letter of the 24th of May, and their delivery-order for the 1,442\frac{3}{4} sacks of beans before set forth, accompanied by the following letter:

"I was disappointed not seeing you yesterday. The enclosed documents left for you I now beg to enclose; and as I am anxious to send the bill accepted to Manchester, if I may not have been sufficiently explicit, I now beg to say that I guarantee, on the part of Lloyd & Co. of Leghorn, that your beans be delivered in good order. Please forward the bill accepted to

"London, 25th May, 1841.

"F. JENKYNS."

Thomas thereupon accepted the bill for the beans, and returned the same to the plaintiff. Thomas, on the 14th of June, applied to the defendant for an advance, and proposed to give him a security for a sum of 1,000l. two bills of lading of two cargoes of oats, and the before-mentioned delivery-order for the 1,442\frac{3}{4} sacks of beans. The two cargoes of oats were distinct property, having nothing to do with the question in this cause. The defendant, on the faith of these securities, gave his acceptance to Thomas for 1,000l., and received from Thomas at the same time the letter of the 24th May, signed by Hunter and Coventry, and the delivery-order for the beans, together with the said two bills of lading.

On the same 14th of June, Thomas explained to the defendant that Hunter and Coventry held the bill of lading of the whole cargo of beans by the Agnes, and stated that he, Thomas, had been informed by the plaintiff that it was all shipped, and the bill of lading made out, to Hunter and Coventry, therefore it was impossible that he, Thomas, could have the bill of lading, which was held by the owner of the larger part of the cargo. The bill for 1,000l. was duly paid by the defendant at maturity. The net proceeds of the two cargoes of oats and of the 1,442\frac{1}{4} sacks of beans, amount to 739l. 1s. 1d., which, being deducted from the sum of 1,000l., the amount of the bill, leaves 260l. 18s. 11d., to which extent the defendant was uncovered by his securities.

Before Thomas's acceptance became due, and before the arrival of the said ship as hereinafter mentioned, namely, on the 1st of July, 1841, Thomas stopped payment. A fiat issued against him

on the 5th of July, 1841; and his before-mentioned acceptance was never paid. The vessel arrived in the river about the 2nd of July, and upon that day, and whilst the cargo of beans remained on board the vessel, the plaintiff addressed, and delivered, to Captain Turcan a letter, of which the following is a copy:

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" London, 2nd July, 1841.

"CAPTAIN TURCAN,—As soon as you arrive, I should wish to see you. My office is, 3, Love Lane, Eastcheap. There is a parcel of beans on board, in dispute. Should you receive an order to deliver the same from Messrs. Hunter and Coventry, by no means do so. You of course consign your vessel to me, as instructed at Leghorn.

"F. JRNKVNS."

And on the same day, the plaintiff addressed and sent to Hunter and Coventry a letter, of which the following is a copy:

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"3, LOVE LANE, July 2, 1841.

"Messes. Hunter and Coventry,—The portion of beans, which I hold, according to your letter of the 24th ultimo, on board the Agnes, Captain Turcan, forming part of 3,001 sacks, I beg you will not allow to be taken away by any parties without further instructions from me.

"F. JENKYNS."

Upon arrival of the ship in London on the 16th of July, 1841, that portion of the cargo which belonged to Hunter and Coventry was delivered to them; but the captain refusing to deliver to the plaintiff the remaining portion of the beans, plaintiff, whilst the beans remained on board the vessel, namely, on the 18th of July, made a formal demand of the same to the captain, and at the same time tendered to him the freight and charges due in respect of them; and the plaintiff also, on the 23rd of July, addressed and sent another letter to Captain Turcan, of which the following is a copy:

" 23rd July, 1841.

"Captain Turcan,—By these presents, I beg to say, that, in refusing to give up the beans to an order dated 24th May, which is now presented by Mr. Hoborne, for 1,442\frac{3}{4} sacks, I beg most distinctly, as the lawful owner of such beans, to hold you harmless from any protest, penalty, or law-suit therefore occasioned.

"F. JENKYNS."

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Captain Turcan, notwithstanding, refused to deliver the beans to the plaintiff, stating at the same time that he held an indemnity from the defendant, to whom, namely, on the 3rd of August, 1841, he delivered the \*same. Hunter and Coventry having previously, and after the receipt of their own portion of the cargo, indorsed on the bill of lading the following memorandum, namely, "the remainder are to be delivered to the holder of an order for 1,442% sacks of beans, signed by us, and dated London, 1841. (Signed) Hunter and Coventry."

This indorsement was made on the 30th of July, 1841.

The beans were subsequently, and before the commencement of this action, namely, on the 9th of August, 1841, demanded of the defendant by the plaintiff.

On the 16th July, 1841, John and Thomas Lloyd, of Leghorn, addressed and sent to the plaintiff a letter, of which the following is a copy:

"LEGHORN, 16th July, 1841.

"MR. F. JENKYNS,—We were duly favoured with your esteemed letter of the 2nd instant, announcing the stoppage of Mr. Thomas, and this morning we have the same displeasing news through our Manchester house. We truly sympathise with you for your loss on this occasion; and as to mentioning to Mr. S., or to Messrs. K. and A., that you are our guarantee, you may rest assured we shall not.

"J. and T. LLOYD."

The defendant claimed the beans in question by reason of the before-mentioned pledge to him by the said J. W. Thomas after he purchased the beans of the plaintiff as above mentioned, and before the arrival of the ship Agnes at London, namely, on the said 14th of June, 1841, and by reason of his the defendant's advance of 1,000l. to the said J. W. Thomas upon the security of the two bills of lading relating to two cargoes of oats, and the above-mentioned delivery-order and letter of Hunter and Coventry so delivered by the plaintiff to the said J. W. Thomas, and by the said J. W. \*Thomas to the defendant, and which last-mentioned bills of lading, delivery-order, and letter the said J. W. Thomas delivered to the defendant at the time he procured the advance.

If the Court are of opinion that the plaintiff was entitled to maintain the action, the verdict is to stand for 320l. 11s. 9d., the

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damages agreed upon between the parties, otherwise a verdict is to be entered for the defendant (1).

JENKYNS v. USBORNE,

The case was argued the last Term (2).

Shee, Serjt. (with whom was Addison) for the plaintiff. \* \* \*

Byles, Serjt. (with whom was Ogle) for the defendant. \* \* \* [ 692 ]

Shee, Serjt. in reply.

[ 696 ]

[The arguments of counsel appear sufficiently from the judgment of the Court. In addition to the cases cited in the judgment the following were referred to in the course of the argument: Brandt v. Bowlby (3), Mitchel v. Ede (4), Haille v. Smith (5), Anderson v. Clark (6), Bryans v. Nix (7), Evans v. Nichol (8), Mason v. Lickbarrow (9), Akerman v. Humphrey (10), Tucker v. Humphrey (11), Harman v. Anderson (12), Litt v. Cowley (13), Whitehead v. Anderson (14), Cuming v. Brown (15), Morrison v. Gray (16), Zagury v. Furnell (17), Busk v. Davis (18), In re Westzynthius (19), Close v. Holmes (20), Phillips v. Huth (21).]

Cur. adv. vult.

## TINDAL, Ch. J. now delivered the judgment of the Court:

This was an action of trover, in which the \*plaintiff sought to

[ \*697]

- (1) The points marked for argument were as follows: For the plaintiff: "The plaintiff will contend that he was the purchaser of the beans in question from or through Hunter and Coventry, and that he afterwards sold them to Thomas, who, having become insolvent before the transit of the beans was at an end, he, the plaintiff, had a right to stop them in transitu; and that having so done, and the defendant having, nevertheless, obtained them from the captain of the vessel, against the will of the plaintiff, he, the defendant, is liable to this action at the suit of the plaintiff."
- For the defendant: "The defendant will contend, on the argument of this case, first, that there was not, under the circumstances therein detailed, any conversion by the defendant of the goods in question; secondly, that, even assuming such a conversion to be proved, the plaintiff had not, at the time of the action brought, such a possession of such goods, or such a

- right thereto, as would enable him to maintain an action of trover."
- (2) 7th June. Before Tindal, Ch. J. and Coltman, J.
  - (3) 36 R. R. 796 (2 B. & Ad. 932).
  - (4) 11 Ad. & El. 888; 3 P. & D. 513.
  - (5) 17 R. R. 356 (1 Bos. & P. 563).
  - (6) 27 R. R. 544 (2 Bing. 20).
  - (7) 4 M. & W. 775.
  - (8) 4 Scott, N. R. 43.
  - (9) 1 H. Bl. 357. See 1 R. R. 425.
  - (10) 1 Car. & P. 53.
  - (11) 4 Bing. 516; 1 Moo. & P. 378.
  - (12) 11 R. R. 706 (2 Camp. 243).
- (13) 17 R. R. 482 (7 Taunt. 169; 2 Marsh. 457).
  - (14) 60 R. R. 819 (9 M. & W. 518).
  - (15) 9 R. R. 603 (9 East, 506).
  - (16) 2 Bing. 260; 9 J. B. Moore, 484.
  - (17) 11 R. R. 704 (2 Camp. 240).
  - (18) 15 R. R. 288 (2 M. & S. 397).
- (19) 39 R. R. 665 (5 B. & Ad. 817; 2 Nev. & M. 644, 650).
  - (20) 2 Moo. & Rob. 22.
  - (21) 6 M. & W. 572.

. . . . . .

JENKYNS \*. USBORNE. recover the value of a quantity of beans, under the circumstances stated in the special case.

On the part of the defendant it was contended, that, by the indorsement of the bill of lading by John and Thomas Lloyd to Hunter and Coventry, coupled with the acceptance by Hunter and Coventry of the bill of exchange for 539l. 9s. 1d., in payment of that part of the cargo which equalled the amount of their order, the property in the whole cargo was transferred to Hunter and Coventry, and that there could be no property in the plaintiff, either as agent of Lloyd & Co., or in his own right. We cannot, however, agree to this position. The delivery of a bill of lading indorsed, as was done in this case, puts it in the power of the indorsee to transfer the property to a bonâ fide purchaser for a valuable consideration, and deprives the original owner of any right of stoppage in transitu; but, as between the original parties,—the consignor and the consignee,—the question whether the property passed, will depend upon what the real contract was.

If Hunter and Coventry had accepted the two bills of exchange drawn upon them, the property in the whole cargo would have passed to them; but they declined to do so, and entered into an agreement with the plaintiff, the nature of which is to be collected from the letter of the 24th of May, 1841, and the delivery-order made in pursuance thereof. This agreement, as far as the assent of John and Thomas Lloyd was necessary to give it validity, appears to us to have been sufficiently ratified by them; inasmuch as the amount of the bill of exchange accepted by the plaintiff, which was in the hands of Hunter and Coventry at maturity, is shown to have been paid to them by the plaintiff,—a fact which is quite inconsistent with the notion of the plaintiff's having acted merely as their agent, in accepting the bill.

[ 698 ]

The effect of this agreement, then, appears to us to have been—that it gave the right to Hunter and Coventry to take possession of, and receive their proportion, of the cargo on the ship's arrival, and to the plaintiff, a right to receive the residue.

It was further contended on behalf of the defendant, that, supposing an interest should be held to have passed to the plaintiff under this agreement, still no particular specific part of the cargo passed to him; and, consequently, that there was no such property in the plaintiff as was necessary to support an action of trover. On the part of the plaintiff it was admitted that, until the division of the cargo between Hunter and Coventry and the plaintiff, there was

no specific appropriation of any part of the cargo, to the plaintiff; but it was contended, and we think rightly contended, that on the delivery to Hunter and Coventry, of their share, the property in the residue of the cargo vested in the plaintiff, who might therefore well maintain this action for a subsequent conversion, provided he had the right to stop the goods in transitu, and had duly exercised that right.

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The general right of an unpaid vendor of goods to stop in transitu, notwithstanding the acceptance of bills for the value of the goods, was not and could not be disputed: Feise v. Wray (1); but it was objected that it is only the owner of the goods who can exercise that right; and that, in this case, the property in the goods had not vested in the plaintiff at the time of the stoppage, but only an interest in, and right to receive, a certain portion of the cargo, to be afterwards ascertained and appropriated to the parties intended: but we see no sound distinction, with reference to the right of stoppage in transitu, between the sale of goods, the property of which is in the vendor, and the sale of an interest which \*he has in a contract for the delivery of goods to him; if he may rescind the contract in the one case for the insolvency of the purchaser, he must, by parity of reason, have a right to rescind it in the other.

[ \*699 ]

But it is further objected that the agreement between the plaintiff and Thomas, coupled with the delivery-order signed by the indorsees of the bill of lading, and the subsequent transfer of the rights of Thomas to the defendant for a valuable consideration, put an end to the right of stoppage in transitu: and that such an arrangement was treated as equivalent to an actual assignment of the bill of lading, which, if made to a bonâ fide purchaser for value, would have that effect.

The actual holder of an indorsed bill of lading may, undoubtedly, by indorsement transfer a greater right than he himself has. It is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not: but the exception is founded on the nature of the instrument in question, which being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading,

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F \*700 1

so as to be in a situation to transfer the instrument itself, which is the symbol of the property itself. In the present case, Thomas was not in possession of the bill of lading: he had only an order on the captain to deliver the goods on arrival; and when, under the circumstances stated in the case, that order was handed over to the defendant, it appears to us, that, although an interest in the contract passed to the defendant, the interest in the goods did not pass, as it would have done if the transfer had been by assignment \*of the bill of lading, but that such interest in the goods was still liable to be defeated by the insolvency of Thomas and a proper exercise of the right of stoppage in transitu.

No case has been found exactly resembling the present: but the observations of Mr. Justice Burrough, in the case of Akerman v. Humphrey (1), appear to us to be very applicable to the present case. In that case certain goods had been consigned by Dent to Hutchinson; an invoice had been sent to Hutchinson (2), and a shippingnote, advertising him that the goods had been shipped for him on board the Durham for Hay's Wharf. Hutchinson handed over the shipping-note to Akerman as a security for money advanced upon it by Akerman, and gave him an order upon the wharfingers to deliver the goods to him on arrival. Hutchinson became insolvent, and the goods were stopped in transitu. Mr. Justice Burrough said: "I do not think the giving of the shipping-note and the delivery-order to the plaintiff, made a change in the property; and I think the shipping-note does not amount to a bill of lading. A bill of lading is exactly like a bill of exchange, and the property it refers to passes by indorsement of it, but not by delivery without indorsement (2). I do not think this shipping-note, from the nature of it, is indorsable; and, here, in point of fact it is not indorsed; therefore, in my judgment, there is no change of property."

Another objection to the plaintiff's right to recover was slightly glanced at, though apparently but little relied on, namely, that Thomas was a person intrusted with a delivery-order, within the meaning of the second section of the 6 Geo. IV. c. 94 (3), and so, capable of making a valid pledge. We think there is no ground for this objection; for the Act appears to us intended only to apply to persons \*intrusted with such documents as factors or agents.

(1) 1 Car. & P. 53.

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<sup>(2)</sup> But after an indorsement in blank, the property in a bill of exchange passes by delivery.

<sup>(3)</sup> Repealed by the Factors Act. 1889 (52 & 53 Vict. c. 45); and see now s. 10 of that Act.

Thomas was in possession of the document in this case, not as the agent of another, but in his own right.

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Upon the whole we think, for the reasons we have assigned, that none of the objections which have been urged, can be sustained; and, consequently, our judgment will be for the plaintiff.

Judgment for the plaintiff.

## LEWIS AND OTHERS v. MARSHALL AND ANOTHER.

(7 Man. & G. 729—745; S. C. 8 Scott, N. R. 477; 13 L. J. C. P. 193; 8 Jur. 848.)

A., a shipbroker, engaged with B., a ship-owner, to have "a full cargo for the ship, the rates of freight for which, would average 40s. per ton, and at least nine cabin passengers, passage-money to average 75l." The contract was fulfilled as to the cabin passengers, but the average rate of freight for goods put on board by A. amounted to 32s. only per ton; he shipped on board, however, several steerage passengers for the voyage, the passage-money paid by whom, after deducting the expense of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship per ton, amount to more than 40s.

Held, that this was not a performance of the stipulations of the contract, "cargo" and "freight" being terms applicable to goods only.

Held, also, that as this was an unusual contract, evidence was not admissible to show that the terms "cargo" and "freight," used with reference to the voyage on which the ship was engaged, would, by the general usage and course of the trade, be considered to comprise steerage passengers and the net profit arising from their passage-money.

Assumpsit. The first count of the declaration stated, that before and at the time of making the agreement and promise of the defendants thereinafter next mentioned, to wit, on the 12th of October, 1842, the plaintiffs were the owners of a certain ship called the Stratheden, which was then about to sail to a certain port beyond the seas, that is to say, to the port of Sydney, in New South Wales, and was, from thenceforward until and at the time of the committing of the breach of promise by the defendants thereinafter mentioned, ready to receive such cargo as thereinafter mentioned; of all which, the defendants, who were then ship-brokers, carrying on the business of ship-brokers in the city of London, then had notice: and thereupon, on the day and year aforesaid, it was agreed between the plaintiffs and the defendants in manner following, that is to say, the defendants engaged to have a full cargo for the said ship, the rates of freight for which, would average 40s. per ton, and, at least, nine cabin passengers, the passage-money to average 75l.: the ship was to be despatched not later than the 15th of December: an extra one and a quarter per cent. \*commission to be charged by the defendants for a guarantee: the ship to be consigned inwards

1844. Jan. 11. April 25, 26. June 29.

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[ \*730 ]

Lewis r. Marshall. on her return to London to the defendants' advice, the commission being one and a quarter per cent.: in the event of the ship being fixed inward by charter-party, the above inward commission not to be charged. Mutual promises. Breach,-after alleging performance by the plaintiffs,—that the defendants did not, nor would, perform their said agreement, or their said promise, but broke their said promise and agreement in this, to wit, that they did not, nor would have, or procure, a full cargo for the said ship, the rates of freight for which would, or did, average 40s. per ton, according to the true intent and meaning of the said agreement, although a reasonable time for so doing had, long before the commencement of the action, to wit, on &c. aforesaid, elapsed, but therein wholly failed and made default; by means whereof the plaintiffs lost, and were deprived of, divers gains and profits, amounting, in the whole, to a large sum, to wit, 100l., which would have accrued to them for, and in respect of, the freight of such cargo, and which, by reason of the premises, would have arisen and accrued to the plaintiffs if the defendants had performed their said promise and agreement.

The second count, after stating, as in the first count, that the plaintiffs were owners of the Stratheden, bound to Sydney, of which the defendants, then ship-brokers in London, had notice,-alleged that thereupon, to wit, on &c. in consideration that the plaintiffs would employ the defendants, for certain reward and commission to them the defendants in that behalf, to act as agents for the said ship, for and during her said voyage, and, in that capacity, amongst other things, to collect the freight which should become payable in England to the plaintiffs, for or in respect of goods shipped on board of the said ship during her said voyage, and to render a true and \*accurate account thereof to the plaintiffs, and to pay to the plaintiffs the balance, if any, which should be due to them, after deducting the amount of the reward and commission then due and payable from the plaintiffs to the defendants as such agents, they, the defendants, promised the plaintiffs so to collect the said freight, and so to render such true and accurate account, and so to pay such balance, if any, to the plaintiffs as aforesaid: that the plaintiffs, confiding in the said promise of the defendants, did then employ the defendants, for such reward and commission as in that behalf aforesaid, to act as agents for the said ship for and during her said voyage, and, among other things, to collect the freight which should become payable in England to the plaintiffs for and in respect of goods shipped on board of the said ship during her said voyage,

[ \*731 ]

and to render a true and accurate account thereof to the plaintiffs, and to pay over to the plaintiffs the balance, if any, which should be due to them, after deducting the amount of the reward and commission due and payable by and from the plaintiffs to the defendants as such agents: that afterwards, and before the commencement of the action, to wit, on, &c. aforesaid, a large amount of freight, to wit, the sum of 1,000l., then was payable in England to the plaintiffs, for and in respect of goods shipped on board of the said ship during her said voyage; but that, after deducting the amount of the said reward and commission due and payable from the plaintiffs to the defendants as such agents as aforesaid, a balance of a certain large amount, to wit, of the amount of 800l., did remain, and was and still is, due and payable to the plaintiffs on account of the said freight; of all which the defendants, before the commencement of this suit, to wit, on &c. aforesaid, had notice; and, although the plaintiffs had always been, and still were, ready and willing to allow the defendants to deduct and retain the amount of their said reward \*and commission out of the said freight, yet that the defendants, broke their said promise in this, to wit, that they, the defendants, did not, nor would, collect the said freight so due and payable to the plaintiffs as aforesaid, although a reasonable time for that purpose had, after the same and every part thereof had so become due and payable as aforesaid, and long before the commencement of the action, to wit, on &c. aforesaid, elapsed, but therein wholly failed and made default: and the defendants further broke their said promise in this, to wit, that they, the defendants, did not, nor would render to the plaintiffs a true or accurate account of the said freight, although the defendants were, before the commencement of the action, to wit, on &c. aforesaid, requested by the plaintiffs so to do, and although a reasonable time for that purpose had, after the same and every part thereof had so become due and payable as aforesaid, and long before the commencement of the action, elapsed, but therein wholly failed and made default: and the defendants further broke their said promise in this, to wit, that they did not, nor would, although theretofore, to wit, on &c. aforesaid, requested by the plaintiffs so to do, and although a reasonable time for that purpose had, after the said freight and every part thereof had so become due and payable as aforesaid, and long before the commencement of the action elapsed, pay over to the plaintiffs the balance of the said freight, after deducting the amount of the said reward and commission due and

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LEWIS r. Marshall. payable to the defendants, but therein wholly failed and made default. And that by means of such breaches of promise, the plaintiffs had been, and were, greatly damnified, and prevented from receiving the same freight, and had lost and been deprived of a large sum of money, to wit, 1,000l., which they otherwise would, and ought to, have received, for and in respect of the freight aforesaid.

[733] There were also counts for money paid, for money had and received, and upon an account stated.

Pleas-first, non assumpsit.

Secondly, to the first count, that the said ship was not ready to receive such cargo as therein in that behalf mentioned, modo et formá.

Thirdly, to the same count, that the defendants did have and procure a full cargo, the rates of freight for which would average 40s. per ton, according to the true intent and meaning of the said agreement.

Fourthly, to the same count, that, after the making of the promise in that count mentioned, and before any breach thereof, and after divers goods and merchandizes had been had and procured by the defendants for part cargo for the said ship, and placed on board thereof, and before the commencement of the action, to wit, on &c. aforesaid, the plaintiffs exonerated the defendants, by their consent, from their said promise, and wholly released and discharged them from further performance thereof. Verification.

Fifthly, to the second count; that, after the making of the promise in that count mentioned, and before any breach thereof, and before the commencement of the action, to wit, on the 1st of October, 1842, the plaintiffs exonerated the defendants from their said promise in this behalf, and released and discharged them from the performance thereof. Verification.

Sixthly, to the same count, that after the making of the promise in that count mentioned, and before breach thereof, and before the commencement of the action, to wit, on &c. aforesaid, the plaintiffs hindered and prevented the defendants from performing their said promise, to wit, by collecting the said freight and passage-money themselves, and by divers other ways and means. Verification.

[\*734] Seventhly, to the same count, so far as related to the \*second alleged breach of promise in that count set forth, that the defendants did render to the plaintiffs a true and accurate account of the said freight.

Eighthly, to the fourth and last counts, except so far as the causes

of action in those counts mentioned, related to the sum of 100l., parcel of the moneys in those counts mentioned,—a set-off for work and labour by the defendants as agents for the plaintiffs, and for commission and reward payable to the defendants by the plaintiffs in respect thereof, and for money lent and paid, &c. and upon an account stated.

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Ninthly, as to the fourth and last counts, so far as they related to the 100l., parcel &c., payment of that sum into Court, and no damages ultrà.

The plaintiffs joined issue upon the first, second, third, and seventh pleas, traversed the fourth, fifth, sixth, and eighth pleas, and took the 100l. out of Court in satisfaction of the causes of action as to that sum.

At the trial before Tindal, Ch. J., at the sittings for London after last Michaelmas Term, the following facts appeared:

A letter containing the contract, as declared upon in the first count, was produced; and it was proved, that as to the cabin passengers, the contract had been performed. It was also proved, that the average freight for goods put on board the Stratheden by the defendants, was 32s. per ton, and not 40s.; but that in addition to the goods so shipped, the defendants had put on board several steerage passengers for the voyage, who paid 15l. per head as passage-money; and that the amount of their passage-money, which was paid in advance (after deducting the expense of their diet during the voyage, and the allowance to be made for the tonnage occupied by them and their stores), added to the freight of the cargo of goods, would make the average earnings of the ship amount to more than 40s. per ton.

It was contended, on the part of the plaintiffs, that upon this statement of facts, the contract as to the cargo, had not been performed.

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On the part of the defendants, parol evidence was tendered that the terms "cargo" and "freight," in a contract relating to a voyage of this description, by the general usage and course of the trade, would comprise not only goods, but also steerage passengers and the net profit arising from their passage-money. This evidence was objected to on the part of the plaintiffs. In the first instance it was received by his Lordship, upon the ground that the agreement was a mercantile contract; but, as the contract afterwards appeared to be an unusual one, his Lordship was ultimately of opinion that the evidence ought not to have been received; and he told the jury that

Lewis v. Marshall. the contract must be construed according to the plain and ordinary meaning of its language, and, that, in his opinion, the legal effect of the contract was, that the defendants undertook to procure a full cargo of goods (properly so called) which should average a freight of 40s. per ton; that they had not done this; and that the plaintiffs were therefore entitled to a verdict on the first count.

The jury nevertheless returned a verdict for the defendants on that count.

Jan. 11. Sir T. Wilde, Serjt., in last Hilary Term, obtained a rule nisi for a new trial, upon the ground that the verdict was against the direction of the learned Judge and against the evidence.

April 25, 26. Shee and Byles, Serjts., in last Easter Term (1), showed cause:

(Upon Ersking, J. suggesting that his impression was that the case ought to go down for a new trial, but \*that before it went, the Court ought to say which way the question ought to be left to the jury; it was agreed by the counsel on both sides that the Court should finally decide on the admissibility and effect of the evidence; and that if the verdict were entered for the plaintiffs, the amount of the damages should be settled out of Court.)

The main question in the case is, whether the LORD CHIEF JUSTICE was right in his construction of the contract, and in withdrawing it entirely from the consideration of the jury, who, notwithstanding, have found that the defendants have performed their contract to procure freight. If the contract be a mercantile one, as, it is submitted on the part of the defendants, it is, then, his Lordship's first impression was correct, and evidence should have been admitted of the usage of the trade.

Independently of such evidence, it is by no means clear that the terms "cargo" and "freight" must be taken to apply exclusively to goods; nor will the expression "per ton" vary the effect of the rest of the contract. These terms are not used in any definite sense, but may apply to steerage passengers. The word "cargo" may be applied to human beings; as it is common in the African coast trade to speak of a "cargo of slaves." It is true that in that trade they would be considered merely as merchandize; but there would be no objection to speak of a "cargo of convicts," or a "cargo of

<sup>(1)</sup> Before Tindal, Ch. J., Coltman, Erskine and Cresswell, JJ.

emigrants." The term merely means charge (1). The word "freight" unquestionably includes \*money paid by passengers. "The freight of passengers" is spoken of in Parish v. Crawford (2), as cited in Abbott on Shipping, Part 1, Chap. I. So, in the same work (Part 4, Chap. VIII.), it is said, "with respect to living animals, whether men or cattle, which may die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said, that if there be no express agreement whether the freight is to be paid for the lading or for the transporting them, freight shall be paid as well for the dead as for the living "(3). And again (4): "If a pregnant woman be delivered during the voyage, no freight is due for the infant."

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(CRESSWELL, J.: In the same chapter there is a passage which seems to be against you, where it is said, "In this country, it is not unusual to pay for goods shipped for the East and West Indies, at the time of shipment; but this payment, although in common parlance called freight, is not, in strictness, properly so denominated, that word denoting the price rather of actual carriage, than of receiving goods to be carried." Here, the money was paid in advance.)

Still, the passages cited, show that the words may include a cargo of human beings. So, the term "ton" has not in shipping transactions the same meaning as among landsmen, with whom it is used as implying that the subject-matter is to be weighed: tonnage is applicable as well to passengers as to horses or cattle.

- (1) The term "cargo" is by the American writers, considered as applying to "goods" only: 1 Phillipps on Insurance, 185. It is there said, that a policy on "cargo" has been held in Massachusetts not to apply to mules and horses, whether on deck or under deck, the underwriters having no notice that such was the cargo. They are, says Mr. Justice Putnam, giving the opinion of the Court, "subjects of particular insurance, and not covered under the general word cargo or goods." (Citing Wolcott v. Eagle Ins. Co., 4 Pick. 429.) A similar decision has been given in Maryland. (Citing Allegre's Administrators v. Maryland Ins. Co., 2 Gill. & Johnson, 136.) In the Dictionnaire de l'Académie,
- "charge" is usually applied to a ship's burthen, whilst cargaism (cargo) is defined as "marchandises qui font la charge d'un vaisseau." So, in the Diccionario de la Academia Española, cargazon (the cargamento of the Código de Comercio) is defined as "la carga de géneros (goods) ó mércaderias (merchandize) que se pone en alguna embarcacion,—Merces in navi vehendæ." See also Weskett, Ins. tit. Goods.
- (2) Page 32, 6th ed. [pp. 57—60, 14th ed.]; S. C. shortly reported, 2 Stra. 1251.
- (3) 6th ed. 363; citing Dig. 14, 2, 10; Roccus, Nos. 76—78; Molloy, Bk. 2, Ch. 4, s. 8 [14th ed., p. 658].
- (4) Citing Roccus, No. 79; Molloy, Bk. 2, p. 4, s. 8.

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But this being a mercantile contract, evidence of usage is properly receivable to explain it. (Upon this point they cited Robertson v. French (1), Donaldson v. Forster (2), Vallance v. Dewar (3), Ougier v. Jennings (4), Noble v. Kennoway (5), Moxon v. Atkins (6), Robertson v. Clarke (7), Bottomley v. Forbes (8), Cockburn v. Wright (9), Palmer v. Blackburn (10), Pelly v. The Royal Exchange Insurance Company (11), Powell v. Horton (12), Backhouse v. Ripley (13), Ross v. Thwaite (13), Da Costa v. Edmonds (14), Gould v. Oliver (15), Milward v. Hibbert (16), Power v. Whitmore (17), Simonds v. White (18), Hutton v. Warren (19), Haynes v. Holliday (20), Hutchinson v. Bowker (21), and Smith's notes (22) to Wigglesworth v. Dallison (23).

The evidence clearly showed a known practice on similar voyages to take steerage passengers instead of goods; with reference to which the parties must be taken to have contracted.

(TINDAL, Ch. J.: Your argument would be the same if the guarantee had been silent as to any passengers.)

Undoubtedly.

[ \*739 ] (TINDAL, Ch. J.: On \*this sort of cargo there would be no lien for the freight.)

> The plaintiffs at any rate have no equitable right to complain; for it appears they have obtained a more remunerating employment for the ship than if it had been used solely in carrying goods. What was stated at the trial as to the contract being an unusual one, was said with reference to the guarantee from the broker to the owner;

- (1) 7 R. R. 535 (4 East, 130; 4 Esp. N. P. C. 246).
- (2) Abbott on Shipping, 440, n. (a), 14th ed.
  - (3) 10 R. R. 733 (1 Camp. 503).
  - (4) 10 R. R. 739, n. (1 Camp. 505, n.).
  - (5) 2 Doug. 510.
  - (6) 13 R. R. 789 (3 Camp. 200).
- (7) 25 R. R. 676 (1 Bing. 445; 8 Moore, 622).
- (8) 50 R. R. 629 (5 Bing. N. C. 121; 6 Scott, 816; 1 Arn. 481).
- (9) 6 Bing. N. C. 223; 8 Scott, 469; 8 Dowl. P. C. 260.
- (10) 25 R. R. 599 (1 Bing. 61; 7 Moore, 339).
  - (11) 1 Burr. 341.
  - (12) 42 R. R. 689 (2 Bing. N. C. 668;
- 3 Scott, 110).

- (13) Park, Ins. 25.
- (14) 16 R. R. 763 (4 Camp. 142; 2
- Chitt. Rep. 227).
- (15) 58 R. R. 622 (2 Man. & G. 208; 2 Scott, N. R. 241).
- (16) 61 B. R. 155 (3 Q. B. 120; 2 G. & D. 142).
  - (17) 16 R. R. 416 (4 M. & S. 141).
- (18) 26 R. R. 560 (2 B. & C. 805; 4 Dowl. & Ry. 375).
  - (19) 46 R. R. 368 (1 M. & W. 466).
  - (20) 33 R. R. 580 (7 Bing. 587; 5
- Moo. & P. 572). And see Cross v. Eglis. 36 R. R. 498 (2 B. & Ad. 106); Smith
- v. Blandy, Ry. & M. 260; Hall v. Benson, 7 Car. & P. 911.
  - (21) 52 R. R. 821 (5 M. & W. 535).
  - (22) 1 Smith, L. C., 11th ed., p. 578.
  - (23) 1 Doug. 201.

it was not meant that the subject-matter of the contract was unusual.

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(CRESSWELL, J.: It would be an important question whether the owner could reject steerage passengers as cargo. In an action against the broker for not supplying a cargo, he might plead a tender of a cargo; would that plea be supported by proof of a tender of steerage passengers?)

That is nearly the same as the present question. The contract may have three constructions; first, that the broker might tender any goods; secondly, that he might tender such as were convenient; thirdly, that he might tender such only as the owner liked to take. The second is probably the true construction. Suppose in this case that no guarantee had been given, or that there had been merely a contract by the broker to do his best to find a cargo, surely parol evidence would have been admissible to explain the meaning of the term "cargo." The construction of a contract, if unusual, is for the Court: still, if mercantile or technical words are introduced, parol evidence is admissible to explain them. was proved to be usual to carry steerage passengers to Australia. Some passengers were clearly contemplated by the contract; steerage passengers were not expressly mentioned; but as it could not have been intended to exclude them, they were to be taken in addition to the cargo of goods, properly so called.

Sir T. Wilde, Serjt. (with whom was J. W. Smith), in support of the rule:

The plaintiffs do not complain that the defendants have put on board steerage passengers; \*on the contrary, they would have been glad of more, as they were a subject of profit to the plaintiffs. The question is, what did the parties contemplate besides passengers, with reference to the rest of the ship? The contract declared upon in the first count, which is called a guarantee, is, in effect, the whole contract, beyond the general contract, upon which the second count is founded, that the defendants would do their general duty as ship-brokers. The complaint is, that the portion of the ship appropriated to cargo, has not been stowed with a sufficient quantity of goods to yield the freight contracted for. The meaning of the terms "cargo" and "freight" is perfectly understood. It cannot be said that the opinion of the Lord Chief Justice at the trial was

f \*740 ]

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[ \*741 ]

originally with the defendants. His Lordship merely thought that, if it could be shown there was a particular usage in the trade to explain these terms, they might be so explained by parol evidence. But no such usage was proved. Steerage passengers are generally in a certain given proportion to cabin passengers. The contract is to provide "a full cargo," and that means what a ship, or that portion of it which is calculated for cargo, will carry. The defendants profess to have executed the contract by loading something which is not cargo. There is nothing ambiguous in the term "cargo;" it means merchandise. When a cargo of slaves is spoken of, it is—as admitted on the other side—because they are considered as merchandise. Is there any case upon a policy on freight, where "freight" has been held to include passage-money? But, at any rate, the cargo here is to be calculated by the ton.

(COLTMAN, J.: How is tonnage calculated as to living animals, such as sheep or cattle?)

It is believed such cases are always specially provided for. When the witnesses spoke of the passage-money as being considered freight, they meant in that term \*to include all the earnings of the ship. But, in fact, no usage was proved: nor is this a contract as to which a usage could exist; it is not like a contract made in a particular part of the country, where "a thousand rabbits" means This being an unusual contract, the first step for admitting evidence of usage fails. It is a special contract; which must be taken to be made with reference to the general meaning of the terms employed. In speaking of the construction of the words of a charter-party, Lord Tentenden lays down the rule, that although they may receive a liberal construction, yet the construction must not be inconsistent with their plain and There is no ambiguity in the words of this obvious meaning (2). contract; the defendants seek to raise an ambiguity.

(Ersking, J.: That is the very case in which an ambiguity may be explained; where it is raised by extrinsic evidence.)

Here, the attempt to raise an ambiguity fails.

The learned Serjeant then proceeded to comment upon, and distinguish, the cases cited on the other side, and concluded by

<sup>(1)</sup> Vide Smith v. Wilson, 37 R. R. (2) Abbott on Shipping, p. 260. 536 (3 B. & Ad. 728; Smith, L. C. 728). 6th ed.

submitting that the basis for admitting parol evidence had not been laid, or that if it had been, there was no evidence of the existence of any usage applicable to the particular contract.

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Cur. adv. vult.

The following judgment of the Court was now delivered by

### TINDAL, Ch. J.:

The question which has been argued before us, arises on the issue taken in the third plea, upon an allegation in the first count in the declaration. That count was framed upon a letter of guarantee written by the defendants, the ship-brokers to the plaintiffs, the owners of the ship Stratheden, by which letter the defendants engaged with the plaintiffs "to \*have a full cargo for the Stratheden, the rates of freight for which, would average 40s. per ton, and, at least, nine cabin passengers, passage-money average 751." The breach of contract assigned in the declaration was "that the defendants did not have and procure a full cargo for the said ship, the rates of freight for which would average 40s. per ton, according to the true intent and meaning of the agreement;" and the defendants, in their plea, took issue upon this breach, in the terms in which it was framed. At the trial it was proved that the average rate of freight for goods put on board by the brokers, amounted to 32s. only per ton instead of 40s., as specified in the guarantee; but it was also proved, that besides the goods, the brokers had shipped on board several steerage passengers for the voyage, and that the passage-money paid by such steerage passengers, after deducting therefrom the expense of their diet during the voyage, and the allowance to be made for the tonnage occupied by them and their necessary stores when added to the freight of the cargo, properly so called, made the average earnings of the whole ship per ton amount to more than 40s. And the question at the trial was whether this was a performance of the terms of the guarantee.

The defendants offered parol evidence to prove that the terms "cargo" and "freight," when used in a contract of this description, and with reference to the voyage on which this vessel was engaged, did, by the general usage and course of the trade, not only comprise cargo and freight, in the strict and proper sense of those words as applicable to goods, but comprised also steerage passengers and the net profit arising from their passage-money.

[ \*742 ]

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[ \*743 ]

The plaintiffs, on the other hand, objected to the admissibility of this evidence, where the terms of the contract were, as they contended, precise, and perfectly free from all ambiguity. thought, however \*that the case fell within that class of mercantile contracts in which such evidence had been held admissible, and received it accordingly. But, as the evidence appeared to me, after it had been received, to be not admissible, I declined to leave it to the jury as a mean of interpreting the contract, but told them the words of the agreement must be understood in their plain and ordinary meaning, and that the legal effect of the contract was, that the brokers engaged to procure a full cargo of goods, properly so called, which should average a freight of 40s. a ton, which they had not done; and that the jury should, therefore, find their verdict on the first count, for the plaintiffs. The jury, nevertheless, found their verdict upon this count for the defendants; and the case comes before us on a motion for a new trial as upon a verdict against the evidence and the direction of the Judge.

Upon showing cause against the rule, it was contended, on the part of the defendants, first, that I ought not to have withdrawn the effect of such evidence from the jury, and taken the construction of the contract upon myself; and secondly, that the evidence given at the trial, proved that the true construction of the contract was that which the defendants had contended for. And, as the respective parties had requested the Court to substitute themselves for the jury, and to make a final conclusion of the question between them both as to the law and as to the fact, it becomes necessary to decide both questions.

Upon the first point, we take the acknowledged distinction to be this: if the evidence offered at the trial, by either party, is evidence by law admissible for the determination of the question before a jury, the Judge is bound to lay it before them, and to call upon them to decide upon the effect of such evidence: but, whether such evidence, when offered, is of that character and description \*which makes it admissible by law, is a question which is for the determination of the Judge alone, and is left solely to his decision.

[ •744 ]

On the present occasion, the question was, whether there was a recognised practice and usage with reference to the voyage and business out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used these words in such sense.

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The character and description of evidence admissible for that purpose is, the fact of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses; for the contract may be safely and correctly interpreted by reference to the fact of usage; as it may be presumed, that such fact is known to the contracting parties, and that they contract in conformity thereto; but the judgment or opinion of the witnesses called, affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge. And, upon referring to the notes of the evidence on the trial, we are inclined to think that the evidence offered fell under the latter character and description, and, upon that ground, that it was properly withdrawn by the Judge from the consideration of the jury.

It becomes unnecessary, however, from the course which the cause has taken, that we should arrive at a positive opinion on this point; for we all agree in thinking that, if the evidence had been submitted to the jury, they ought to have found their verdict for the plaintiffs. The contract itself, as it appears to us, speaks with much plainness and precision. The words "cargo" and "freight" do, primâ facie, and in their natural and ordinary meaning, refer to goods only; and where, in the same document, occur the words \*" cabin passengers" and "passage-money," and a contract is made between the same parties as to such latter mentioned subject-matter, the inference is almost irresistible, that the former words were not intended, within the meaning of the contracting parties, to comprise passengers and passage-money of any description: the parties showing themselves capable of making a contract as to passengers by their proper and specific name. In order, therefore, to vary the ordinary meaning of such plain words, and to make them comprise passengers and passage-money as well as goods, we think the evidence ought to have been clear, cogent, and irresistible: whereas. at the trial, although two witnesses spoke of the usual course and practice of the trade, the third spoke of his own judgment only; no instance of such construction is stated by any of the witnesses within their own knowledge; and the agreement itself is declared not to be according to the usual course of things. The fair inference to be drawn from their testimony at the trial, appears to us to be,-that it is customary, in calculating the earnings of a ship or making up the account of the earnings, to include money paid for steerage passengers, but that there is no general usage, that, in a contract of this description, such meaning should prevail.

[ \*745 ]

Lewis r. Marshall. We therefore think, upon this evidence, that instead of a new trial, the verdict which has been found for the defendants upon the first count, should be set aside, on the usual terms, and be entered for the plaintiffs for such sum as shall be ascertained between the parties, under the agreement entered into.

Rule accordingly (1).

1844. June 29.

#### KAYE v. DUTTON.

(7 Man. & G. 807—818; S. C. 2 Dowl. & L. 291; 8 Scott, N. R. 495; 13 L. J. C. P. 183; 8 Jur. 910.)

Assumpsit upon an agreement whereby, after reciting that one W. in his lifetime, mortgaged certain premises to R. and B. to secure 3,500%; that R. and B. required W. to procure the plaintiff to join him in a bond, as a collateral security for that sum and interest; that the defendant had, since the death of W. taken upon himself the management of the estate of W., and had paid to R. and B. 3,3701.; that the plaintiff had been called upon as surety, and had paid to R. and B. 1301.; that the defendant had repaid him 48/., leaving 82/. due; that the defendant had agreed to repay the plaintiff the 821. out of the moneys which might arise from the sale of the mortgaged premises, and in the meantime to appropriate the rents towards payment of the same, as the plaintiff had a lien upon the premises for the same; that the defendant had requested the plaintiff to release and convey all his estate and interest in the premises to A. and L., and that he had already done, reserving to himself a lien on the said property, it was witnessed, that, in consideration of the plaintiff's having paid the 130% to R. and B. in part discharge of the mortgage, and in consideration of his having released and conveyed all his estate and interest in the premises to A. and L., and in order to secure to the plaintiff the repayment of the 821, the defendant undertook and agreed with the plaintiff to pay him the same, with interest, out of the proceeds of the premises when sold, and, in the meantime, to appropriate the rents in liquidation of the same. The declaration then stated that, in consideration of the premises, the defendant promised the plaintiff to perform the agreement; and alleged, for breach, that, although the defendant had received rents to a sufficient amount, he had failed to pay: Held, that, inasmuch as the declaration did not show that the plaintiff had any interest in the premises, except that which he reserved, his release and conveyance, though executed at the defendant's request, formed no legal consideration for the promise alleged to have been made by the latter.

Assumpsit. The first count of the declaration stated, that, by a certain agreement or instrument in writing made by the defendant, theretofore, to wit, on the 22nd of September, 1836, after reciting that one Whitnall, in his life-time, released and assured by deeds of the 30th and 31st of May, 1832, his freehold dwelling-houses and

(1) In construing a usual mercantile contract, the question would seem to be,—in what sense have the terms been used in similar contracts? in the

case of an unusual contract,—have the terms acquired any, and what, peculiar meaning in general mercantile language or in the particular trade?

hereditaments at Windsor, in Upper Parliament Street, in Toxteth Park, unto R. Rockliff and H. Bullen, their heirs and assigns, by way of mortgage, to secure the repayment of 3,500l.; and also reciting that the said Rockliff and Bullen required the said \*Whitnall to obtain the plaintiff to join him in a bond as a collateral security further to secure the repayment of the said sum of 3,500l. and interest; and also reciting that the defendant had, since the death of the said Whitnall, taken upon himself the management of the estate of the said Whitnall, and had paid to the said Rockliff and Bullen 3,370l.; and also reciting that the said Bullen and Rockliff had called upon the plaintiff for payment of the said mortgage, and he was surety for the said Whitnall in the said bond, and that the plaintiff thereupon paid to the said Bullen and Rockliff the sum of 190l. on the 1st of May, 1835; and also reciting that the defendant had repaid the plaintiff the sum of 48l., leaving due to him the sum of 821., and that such last-mentioned amount the defendant had agreed to repay to the plaintiff out of the moneys which might arise from the sale of the said hereditaments and premises when the same should be sold, and in the meantime to appropriate the rents of the said hereditaments and premises towards payment of the same sum, as the plaintiff had a lien on the said hereditaments and premises for the said sum of 821.; and also reciting that the defendant had requested the plaintiff to release and convey all his estate and interest in the said hereditaments and premises to Alison and Lenox, and that that he had already done, reserving to himself a lien on the said property as aforesaid-It was by the said agreement or instrument in writing witnessed, that, in consideration of the plaintiff's having paid to the said Bullen and Rockliff the said sum of 1801., in part discharge of the said mortgage, and in consideration of the plaintiff's having released and conveyed all his estate and interest in the said hereditaments to Alison and Lenox (reserving to himself the said lien), and in order to secure to the plaintiff the repayment of the said sum of 821., he the defendant did thereby for himself undertake and agree \*with the plaintiff, his executors, administrators, and assigns, to pay to him or them the said sum of 821., with interest thereon, out of the proceeds to arise from the sale of the said hereditaments and premises, when the same should be sold, and, in the meantime, and until such sale was effected, to appropriate the rents of the said hereditaments and premises, in liquidation of the said sum so due to the plaintiff as aforesaid; as

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by the said agreement or instrument in writing, reference being thereunto had, will appear: Averment, that, the said agreement or instrument in writing being so made as aforesaid, he, the defendant, in consideration of the premises, afterwards, to wit, on the said 22nd of September, 1836, promised the plaintiff to observe and perform the said agreement or instrument in writing, in all things therein contained and on his the defendant's part to be observed and performed; that, after the said agreement or instrument in writing was made as aforesaid, and before the said sale therein mentioned was effected, to wit, on the 30th of September, 1836, and on divers other days between that day and the commencement of the suit, the defendant received the said rents in the said agreement or instrument mentioned, to a large amount, to wit, to the amount of 2,000l., which he could and might and ought, according to the said agreement or instrument in that behalf, to have appropriated in liquidation of, and which were sufficient to liquidate, the said sum of 821. so due to the plaintiff as aforesaid; yet the defendant, disregarding the said agreement or instrument and his said promise, did not nor would, although theretofore, to wit, on the 1st of September, 1839, requested by the plaintiff so to do, appropriate the said rents so received by him as aforesaid, or any part thereof, in liquidation of the said sum of 82l. so due to the plaintiff as aforesaid, or pay the same rents, or any part thereof, to the plaintiff on account, or in discharge, or part discharge, of that \*sum of money, or otherwise howsoever, but wholly refused so to do, and the last-mentioned sum of 82l. is still wholly unliquidated. and wholly due and unpaid to the plaintiff.

[ \*810 ]

To this count the defendant pleaded amongst others two special pleas, to the replications to which he demurred specially. Upon the argument in Easter Term last, however, the defendant abandoned the pleas, and objected to the declaration.

Dowling, Serjt., for the defendant:

Three objections arise on the declaration: first, it discloses no consideration for the promise alleged; secondly, the consideration (if any) is a mere moral consideration; thirdly, the consideration being executed, it can only sustain an implied promise (1); whereas the promise alleged is a different one, being an express promise.

Construing the declaration most favourably for the plaintiff, it appears that he having become surety for Whitnall, the mortgager,

paid 1901. to the mortgagees; that the defendant, who had taken upon himself the management of Whitnall's estate, had repaid him 481., and promised to pay him the residue out of the proceeds thereof; and that the plaintiff, at the request of the defendant, released and conveyed all his interest in the premises to Alison and Lenox, reserving to himself a lien on the property. This statement of facts does not disclose any consideration whatever for the defendant's promise. The only interest the plaintiff ever had in the premises was the lien, which entitled him, in equity, to stand in the position of the mortgagees: Copis v. Middleton (1). The recital that the defendant had released all his estate and interest in the property, except his lien, is in effect to say, that he had \*released nothing. Possibly the consideration might have been good if it had been alleged that the plaintiff had executed some instrument purporting to convey an interest. In Wilkinson v. Oliveira (2). the declaration stated that, in consideration that the plaintiff, at the request of the defendant, had given the defendant a letter written by O., since deceased, by means of which letter the defendant was enabled to, and did, determine controversies, and obtained a large portion of O.'s effects, the defendant promised to give the plaintiff 1,000l.: and it was held that the declaration disclosed a sufficient consideration to sustain an action on the promise. So here, if the declaration had stated that the plaintiff had executed an assignment, it might have been sufficient; but the only consideration alleged is, the assigning of his interest; whereas he had none to convey.

Secondly. The only consideration that appears upon the face of the declaration (if any) is a mere moral consideration, to which the law will give no effect. A past consideration will not support a subsequent promise: Jeremy v. Goochman (3), Barker v. Halifax (4), Docket v. Voyel (5). The law does not, in truth, give effect to any but an executory (6) consideration. It may be said that the consideration here is not simply an executed consideration, because it is stated that the defendant had requested the plaintiff to convey. But a mere request is of no avail: Lampleigh v. Brathwait (7). The promise alleged and the promise implied by law, must be co-extensive: Veitch v. Russell (8).

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[ \*811 ]

<sup>(1)</sup> T. & R. 224.

<sup>(2) 1</sup> Bing. N. C. 490; 1 Scott, 461.

<sup>(3)</sup> Cro. Eliz. 442.

<sup>(4)</sup> Ib. 741.

<sup>(5)</sup> Ib. 885.

<sup>(6)</sup> I.e., executory in its inception.

<sup>(7)</sup> Hob. 105; Sir F. Moore, 866.

<sup>(8) 3</sup> Q. B. 928; 3 G. & D. 198.

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[ \*814 ]

(Tindal, Ch. J.: That case shows that a subsequent express promise will not convert \*that into a debt which, of itself, was not a legal debt.)

It establishes that an express promise cannot be supported by a moral consideration.

Thirdly. If the Court think that any promise can be implied from the facts stated, it will not be the promise alleged. It is clear that an executed consideration will only sustain such a promise as the law will imply. [He cited Brown v. Crump (1), Granger v. Collins (2), Hopkins v. Logan (3), Jackson v. Cobbin (4), and Roscorla v. Thomas (5).]

The declaration is good. The defendant's promise being laid to

[813] Channell, Serjt., contrà:

have been made in consideration of the premises, that is, of all that is stated in the foregoing part of the declaration, it is submitted that the facts alleged disclose a sufficient legal consideration. Admitting that a mere moral consideration \*ordinarily will not sustain a promise, here a legal consideration is apparent. defendant had any estate or interest to convey, his parting with it at the defendant's request, would be an ample consideration: and upon this declaration it is not competent for the defendant to say that the plaintiff did not release some interest in the mortgaged premises. Having paid money as surety for the mortgagor he would stand in his place, and if any interest can be inferred beyond the lien, there is a good consideration. The difficulty arises on the words "reserving to himself a lien on the said property." The fair meaning of that is, that the plaintiff had given up his lien so far as regarded Alison and Lenox, but preserved it as between himself and the defendant. As to the second point, the rule upon this subject is well laid down in 1 Wms. Saund. 264, n., where it is said that "a past consideration is not sufficient to support a subsequent promise, unless there was a request by the party, either express or implied, at the time of performing the consideration; but where there is an express request at the time, it will in all cases be sufficient to support a subsequent promise." Here, what is treated as a past consideration is stated to have been done because of the defendant's request. Cases have been cited to show that the

<sup>(1) 1</sup> Marsh. 567; 6 Taunt. 300. Dowl. N. S. 96).

<sup>(2) 55</sup> R. R. 687 (6 M. & W. 458). (5) 61 R. R. 216 (3 Q. B. 234; 2

<sup>(3) 52</sup> R. R. 704 (5 M. & W. 241). G. & D. 508).

<sup>(4) 58</sup> R. R. 869 (8 M. & W. 790; 1

past consideration here stated, does not support the particular promise alleged in the declaration: but those cases are distinguishable; as, in all of them, the promise implied by law differed widely from that alleged on the face of the declaration. The question how far a moral consideration will support a subsequent express promise, is discussed by Lord Denman, in Eastwood v. Kenyon (1). Here, looking at the whole declaration, a sufficient consideration appears for the promise laid.

KAYE DUTTON.

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the Court:

[ 815 ]

This was a declaration in assumpsit upon a special agreement, to which the defendant pleaded, amongst others, two special pleas, namely, the fourth and fifth pleas, to which the plaintiff demurred: and the defendant demurred specially to the plaintiff's replication to the third plea. But it is unnecessary to advert to the particular state of the pleadings, as it was admitted by my brother Dowling, on the argument for the defendant, upon an objection taken to the fourth and fifth pleas, that he could not support those pleas, and the whole argument before us turned on the sufficiency of the declaration.

Two objections were made to the declaration—first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. cases cited by the defendant, viz., Brown v. Crump (2), Granger v. Collins (3), Hopkins v. Logan (4), Jackson v. Cobbin (5), and Roscorla v. Thomas (6), certainly support that proposition to this extent, that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the \*promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must be nudum pactum, Dowl. 360).

[ \*816 ]

<sup>(1) 52</sup> R. R. 400 (11 Ad. & El. 438; 3 P. & D. 276).

<sup>(5) 58</sup> R. R. 869 (8 M. & W. 790; 1

<sup>(2) 1</sup> Marsh. 567; 6 Taunt. 300.

Dowl. N. S. 96).

<sup>(3) 55</sup> R. R. 687 (6 M. & W. 458).

<sup>(6) 61</sup> R. R. 216 (3 Q. B. 234; 2

<sup>(4) 52</sup> B, B. 704 (5 M, & W. 241; 7 G, & D. 508),

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[ \*817 ]

there remaining no consideration to support it. But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law; that is, where a party suing has sustained a detriment to himself or conferred a benefit on the defendant, at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. Hunt v. Bate (1), and several cases mentioned in the margin of the report of that case, seem to go to that extent: as also do some others collected in Roll. Abr. Action sur Case (Q) (2). But it is not necessary that we should pronounce any opinion upon that point; for, assuming it to be sufficiently alleged that the plaintiff released and conveyed his interest at the request of the defendant, yet it does not appear that he had any interest which passed by such release and conveyance. The declaration is founded on an agreement which recites that a certain estate had been mortgaged by one Whitnall, since deceased; and that the plaintiff had joined in a bond as a collateral security for the mortgage-money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of Whitnall's affairs, had repaid to the plaintiff part of the money which he had paid and had agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the meantime to appropriate the rents of the premises to the payment of the same sum as that for which the \*plaintiff had a lien on the said premises. far there is nothing to show that the plaintiff had any other interest than this lien. The agreement then recites that the defendant had requested the plaintiff to release and convey his interest to Alison and Lenox, and that he had done so, reserving to himself a lien on the property as aforesaid, that is, reserving to himself the only interest that he is shown to have had, The agreement then proceeds to state that, in consideration of the plaintiff having paid the money and having released and conveyed all his estate and interest to Alison and Lenox, reserving to himself the said lien, the defendant undertook and agreed, &c. Now, the payment of the money by the plaintiff would be no consideration for the defendant's promise; and the alleged release and conveyance was again no

(1) Dyer, 272.

(2) 1 Roll. Abr. 11; translated, 1 Vin. Abr. 279.

consideration, for it does not appear that the plaintiff parted with any thing by it. For the plaintiff it was contended, that he must be taken to have parted with his lien on the property, reserving only his right to call upon the defendant to pay the residue still due to the plaintiff, out of the proceeds of the estate, when sold, and, in the meantime, to appropriate the rents to the same object. But we cannot put that construction upon the agreement, which expressly speaks of the lien reserved as the same lien which the plaintiff had before.

Such being in our judgment the effect of the agreement set out in the declaration, the case resembles that of Edwards v. Baugh (1). There, the declaration alleged that certain disputes and controversies were pending between the plaintiff and defendant, as to whether the defendant was indebted to the plaintiff in a certain sum of money, and that thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the said sum in dispute, but would \*accept a smaller sum in full satisfaction, the defendant promised to pay such On general demurrer, the declaration was held smaller sum. bad, because it did not allege that any debt was due from the defendant to the plaintiff, or that an action had been commenced for the recovery of any sum claimed. So, in the present case, as the declaration does not show that the plaintiff had any interest in the premises except that which he reserved, it does not appear that his release and conveyance, although executed at the defendant's request, formed any legal consideration for the promise alleged to have been made by the latter. Our judgment must therefore be for the defendant.

Judgment for the defendant.

## STEAD v. WILLIAMS AND OTHERS.

(7 Man. & G. 818—843; S. C. 8 Scott, N. R. 449; 13 L. J. C. P. 218; 8 Jur. 930; 2 Web. P. C. 126.)

Where an invention is described in a work publicly circulated in England, a party who afterwards takes out a patent for it, is not the true and first inventor, whether he derives his knowledge from such publication or not (2).

CASE, for an infringement of a patent right [for an invention for "making or paving public streets and highways, and public

(1) 63 R. R. 702 (11 M. & W. 641).

(2) Cited with approval in Patterson v. Gas Light and Coke Co. (1877) 3 App. Cas. 239, 45 L. J. Ch. 843; Plimpton v. Malcolmson (1876) 3 Ch. D. 531, 45

L. J. Ch. 505; Plimpton v. Spiller (1877) 6 Ch. Div. 412, 47 L. J. Ch. 211;
Harris v. Rothwell (1887) 35 Ch. Div. 416, 56 L. J. Ch. 459.

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[ \*818 ]

1844. May 2, 6. June 29.

[ 818 ]

STEAD v. Williams. and private roads, courts, and bridges, with timber, or wooden, blocks." The defendants pleaded—first, Not guilty; second, that the plaintiff was not the true or first inventor of the invention; and sixth, that before the granting of the letters patent the supposed invention had been publicly and generally known, used, practised and published. Upon the first and second pleas issue was joined, and to the sixth the plaintiff replied that the invention was not publicly or generally known, used, practised, or published, as alleged. There were several other pleas, upon some of which issue was joined, and to others of which there were special replies (1)].

[ 822 ]

At the trial before Cresswell, J., at the last Summer Assizes at Liverpool, the specification was put in.

[ 824 ]

The defendants had in various parts of the town of Manchester, laid pavement composed of hexagonal blocks of wood, similar in size and character, to those described in the plaintiff's specification.

The defence, which was conducted by a Company called "The Metropolitan Patent Wood Paving Company," the parties employed by the defendant to lay down the pavement in question, rested mainly on the second plea. Prior to the date of the plaintiff's patent, various modes of paving streets and roads with wood had been the subject of observation and discussion in works of a scientific character published in this country; amongst others, in a letter addressed by Mr. Finlayson to the editor of "The London Journal of Arts," which appeared in that work in 1825, and also in two letters addressed by Mr. Heard to the secretary of the Society of Arts, published in their "Transactions" of 1883. "The London Journal of Arts" has a considerable circulation; "The Transactions of the Society of Arts" are published periodically, for distribution among 800 members, as well as for sale, 1,500 copies being printed.

[The report in 7 Man. & G. then sets out at length Mr. Finlayson's and Mr. Heard's letters and certain extracts from "The Mechanics' Magazine," published in London on the 24th of September, 1825, and the 15th of March, 1834, which were read at the trial.

[ 831 ]

The steward of Sir William Worsley stated that, in 1834, some wood paving was laid down in the vestibule of Hovingham Hall, Yorkshire, consisting of hexagonal blocks tapering towards the bottom (one of which was produced); that this vestibule was

the above summary of the pleadings is sufficient for this reprint.

<sup>(1)</sup> In the report in 7 Man. & G. the declaration and seven pleas are set out at considerable length. It appears that

a covered way leading from the riding-house into the pleasuregrounds, about thirty-five feet in length and ten feet in width; that every carriage going to the mansion must pass over this pavement: that many persons went to see it whilst laying down, and since; and that the blocks were laid upon a surface of sand, and driven in with a rammer, after the manner of stone paving.

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Several other witnesses professing acquaintance with the subject concurred in saying that there was no substantial difference in principle between the description of the block in the plaintiff's specification, and that produced from Sir William Worsley's pavement; and that the practicability of paving streets with wood had been \*well-known to scientific men ever since the publication of Finlayson's and Heard's letters.

[ \*832 ]

The learned Judge, after directing the jury to find for the plaintiff upon the first issue, said, with reference to the second issue, that, if the subject-matter of the patent was the result of information communicated to the plaintiff from a foreign country, he would, in contemplation of law, be entitled to a patent, as being the first and true inventor; but that it was otherwise, if he derived his information either from books published in this country or from oral communications from any person here: that, if the plaintiff had acquired, from scientific works published in this country, the knowledge that enabled him to take out the patent, the patent would be void; for that it was not competent to any individual so to avail himself of that knowledge and information which had already been given to the public. After observing that the defendants had not brought home to the plaintiff the fact of his having seen the letter of Finlayson or that of Heard, he told them that it was for them to judge, upon the whole of the evidence, whether or not the plaintiff had seen those publications, and so had derived his alleged invention from the common stock of knowledge already possessed by the public of this country, or whether, as suggested in the patent, he had derived it from some person resident abroad, a source of information which the law regarded as equivalent to invention. The learned Judge said that he was unable to discover the slightest difference between the mode of paving described by Mr. Heard, and the mode pointed out in the specification; and that the question for the jury to decide was, whether the plaintiff derived the knowledge which enabled him to take out the patent from that which was part of the common stock of knowledge of this country. Upon the third issue, he stated to the jury, as matter of law, that

STEAD &. WILLIAMS. [ \*833 ] the method of paving \*with wood was a "new manufacture," and therefore the proper subject of a patent. Upon the fourth and fifth issues, he said, there could be no doubt as to the utility of the invention, or as to the sufficiency of the specification. Upon the sixth issue, he told them, that if the blocks used at Sir W. Worsley's were essentially the same as those described in the plaintiff's specification, there was such a public user as would make an end of the patent. As to the last issue, the learned Judge expressed an opinion in favour of the sufficiency of the title of the specification; but he reserved the point.

The jury returned a verdict for the plaintiff on all the issues upon the first count.

Channell, Serjt., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence. He submitted that it was not incumbent on the defendants to show that the publications which described the mode of paving claimed by the plaintiff, had come to his knowledge before the date of the patent; that the mere fact of prior publication was conclusive against the validity of the patent, in like manner as a prior patent would invalidate a subsequent patent for the same subject-matter, though the patentee might have no knowledge of the existence of the prior patent. He cited Lewis v. Marling (1), Morgan v. Seaward (2), Carpenter v. Smith (3), Jones v. Berger (4).

Nay 2.

Sir T. Wilde, Serjt. (with whom were Shee, Serjt. and Webster), in Easter Term last showed cause:

[ \*83<u>4</u> ]

The supposed misdirection refers to the issue whether the plaintiff \*is the true inventor; upon which it was left to the jury to consider whether the plaintiff had seen the letters in question, or derived information from them. This direction was substantially such as has repeatedly been given and has never been successfully objected to. The plaintiff was the first person who brought the invention into public notice. The letters of Finlayson and of Heard amount to mere speculations upon the subject: it is quite clear upon the evidence, that the plaintiff alone was the party to whom the public of this country are indebted for this invention. \* \* The defendant relies upon the issues taken upon the second and

<sup>(1) 34</sup> R. R. 313 (10 B. & C. 22; 5 Man. & Ry. 66; 4 Car. & P. 52, 57; 1 Webster, 490, 493). (3) 60 R. R. 736 (9 M. & W. 300; 1 Webster, 530, 540). (4) 5 Man. & G. 208; 6 Scott, N. R.

<sup>(2) 46</sup> R. R. 700 (2 M. & W. 544; 1 208; 1 Webster, 544. Webster, 170, 187).

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[ 835 ]

[ \*836 ]

sixth pleas. [He referred to Lewis v. Marling (1), and Cornish v. Keene (2).] The issue on the second plea goes to the personal merit of the inventor. Upon the simple issue the defendant must contend that the Judge was bound to give a compound direction. Here, the plaintiff's information is not derived from any English source, but is either his own invention or is a communication from a foreigner. It is said that the verdict is wrong, because the jury did not find, as a fact, that the plaintiff had derived his information from the publications which were given in evidence, as in Heard's plan. The production of a newspaper containing a notice of the dissolution of a partnership would not be \*evidence to charge a party with notice of that dissolution, unless it was proved that he was in the habit of reading that newspaper. The alleged publication was limited to a particular class of which the plaintiff did not form one. The points of dissimilarity between the plaintiff's invention and the plans which had been previously suggested, go further towards showing that he is not indebted to those suggestions than the existence of those suggestions tends to show that he availed

There is no ground for the objection to the title. The title of a patent is to be read in connection with the specification.

(TINDAL, Ch. J.: In Cooke v. Pearce (3), it was held by the Judges in the Exchequer Chamber that mere generality in the title, will not vitiate a patent which really includes the invention, provided there be no fraud.)

There is no misdirection and the verdict is right.

Shee, Serjt. on the same side:

Heard is stated by the defendants to have derived his information from abroad; the plaintiff may have done the same. \* \* \*

The term "first inventor" does not import that the party so designated is the first discoverer of the invention in the whole world. It is material to consider what the object of the Legislature was, in limiting the privilege to the first inventor. The case of Cornish v. Keene (4), points out the meaning of the Legislature: one object being, to reward the ingenuity of the inventor. The plaintiff derived no assistance from those who are supposed \*to

[ \*837 ]

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himself of them.

<sup>(1) 1</sup> Webster, 490; 4 Car. & P. 52.

<sup>(2) 1</sup> Webster, 501.

<sup>(3) 13</sup> L. J. Q. B. 189.

<sup>(4) 1</sup> Webster, 501.

STEAD t. Williams. have preceded him. The question as to previous use of the invention, was distinctly left to the jury. The learned Judge ruled precisely as Lord Abinger had done in Carpenter v. Smith (1). In Lewis v. Marling (2), Bayler, J. says (3), "If the model brought from America had been seen by the plaintiff, he could not afterwards have claimed to be the inventor. But if I discover a certain thing for myself, it is no objection to my claim to a patent, that another also has made the discovery, provided I first introduced it into public use." In Carpenter v. Smith, Lord Abinger was of opinion, that a man might be the first and true inventor of that which had been invented before: Walton v. Potter (4).

Channell, Serjt. (with whom were Byles, Serjt., Hoggins and Warren) in support of the rule:

The allegation in the declaration is, that the plaintiff is the first inventor within the realm. The specification is more full. A party who obtains his information from a foreigner, may be considered as the first inventor for the purpose of a patent. But no proof was given that the plaintiff had so obtained information. raise this question: and it lies upon the plaintiff to show that he was the first inventor. There was no proof of any communication \*from abroad as is generally given in such cases. The defendants object to that part of the learned Judge's address to the jury, in which he told them that, although it was shown that the books had been extensively circulated, they were not brought home to the plaintiff. The ground on which the jury return their verdict was, that knowledge of these books had not been brought home to the But it is submitted that, if the description contained in Heard's letters substantially corresponded with the plaintiff's specification, his patent is void, whether knowledge of the publication was brought home to the plaintiff or not. There are three descriptions of publication that will avoid a patent-first, the production and public user of a similar article; secondly, a publication, by means of a specification, of a prior patent for an invention producing the same result; thirdly, a publication in books of science having an extensive circulation in this country. Previous unsuccessful attempts (as in Lewis v. Marling, and other cases cited) will not invalidate the grant: there must be a dedication to the public.

[ \*888 ]

<sup>(1) 60</sup> R. R. 736 (9 M. & W. 300).

<sup>(3) 34</sup> R. R. 317 (10 B. & C. 27).

<sup>(2) 34</sup> R. R. 313 (10 B. & C. 22; 5 Man. & Ry. 66).

<sup>(4) 1</sup> Webster, 580.

Channell in continuation:

STEAD

The communication need not be to the patentee: Tennant's case (1), Dollond's case (2).

WILLIAMS *May* 6.

[ 840 ]

(CRESSWELL, J.: There, the patent related to an article manufactured.)

The party may not be bound to attend to mere reasoning which does not possess the marks of authority; though it may be doubted whether, even in such case, the party is not bound to make some inquiry. However recent a publication may be, and however limited its circulation, still it is a question for the jury, whether the information contained therein, is not fairly brought within the reach of the party.

(TINDAL, Ch. J.: So, if it is to be found in very old books.)

[He referred to Morgan v. Seaward (3), Carpenter v. Smith (4), The Househill Company v. Neilson (5), and Soames's Patent (6).] A very limited publication may not avoid a subsequent patent; but a patentee is not to presume upon his own exclusive ignorance. Here, the jury have misunderstood the effect of the evidence. The blocks used at Sir W. Worsley's, and the blocks described in Heard's letters, were precisely the same as those described in the plaintiff's specification. Public user is something more than a mere experiment or series of experiments; it means, however, not a user by the public, but a user in public, where all persons, going to the spot, may see the thing. From the title of this specification it would naturally be inferred that the patentee claimed an exclusive right to the use of blocks of wood for paving, in lieu of blocks of stone.

(TINDAL, Ch. J.: In *Neilson* v. *Harford* (7), it was held that an ambiguous title will not vitiate a patent, if the ambiguity is explained by the specification.)

Cur. adv. vult.

<sup>(1)</sup> Davies, 431.

<sup>(2)</sup> Cited 2 H. Bl. 487. And see Mr. Webster's remarks upon that case, 1 Webster, 44, 53.

<sup>(3) 1</sup> Webster, 190.

<sup>(4) 60</sup> R. R. 736 (9 M. & W. 300;

<sup>1</sup> Webster, 541).

<sup>(5) 1</sup> Webster, 718, n.

<sup>(6) 1</sup> Webster, 733.

<sup>(7) 8</sup> M. & W. 806; 1 Webster, 331.

Strad v. Williams.

[ \*841 ]

TINDAL, Ch. J., now delivered the judgment of the COURT:

This was an action for the infringement of a patent for an invention for "making or paving public streets and highways, and public and private roads, courts, and \*bridges, with timber, or wooden, blocks." The defendants pleaded "that the plaintiff was not the first and true inventor of the invention in the letters-patent and specification mentioned," besides various other pleas, which it is not necessary to particularise.

Upon the trial, at the last Summer Assizes at Liverpool, before my brother Cresswell, a verdict was found for the plaintiff; but a rule nisi was afterwards granted for a new trial. On the report of the learned Judge, it appears, that, before the granting of the letterspatent, there had been published, in a scientific work, in England, a letter from a gentleman named Heard, containing such a description of a mode of paving with blocks, as made it fit to be submitted to the consideration of the jury, as not differing substantially from the invention for which the patent was granted. In summing up the evidence with reference to this plea, the jury were told, in substance, that, if they thought the patentee had borrowed his invention directly from the publication which had been proved, he could not be considered as the first inventor; also, that, if the matter had been so far communicated to the public as to have become a part of the public stock of information, and he had thus obtained his knowledge indirectly from the publication, he could not be considered as the first inventor within the meaning of the statute.

On the discussion before us, it was contended that this mode of summing up, although undoubtedly correct as far as it went, yet did not present the entire case to the consideration of the jury; for, it was urged, that, if the invention had been communicated to the English public, although it had never, directly or indirectly, come to the knowledge of the patentee, still he could not be considered as the inventor. It was admitted, on the part of the defendants, that no case could be cited in which the point had been expressly decided: but it was contended, that, on reason and principle, such must \*be held to be the law; for that, if the invention had already been communicated to the public, it would be unreasonable that they should lose the benefit of it and be restricted from making use of it, by a patent taken out by one whose claim to such patent could only be supported on the ground of his being ignorant of that which had already been communicated to the rest of the world. And, though no decided case was cited, various

[ \*842 ]

dicta of learned Judges were referred to in support of the view so contended for by the defendants; particularly what was said by ALDERSON, B., in Carpenter v. Smith, and the observations made by Lord Lyndhurst and other Lords of the Privy Council, as reported in 1 Webst. Pat. Cases, 718, 719. Lord Lyndhurst says: "If a machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been worked, is not that an answer to the patent? It is continually the practice on trials for patents, to read out of printed books, without reference to any thing that has been done." And, again: "If the invention is in use at the time the patent is granted, the man cannot have a patent, although he is the original inventor: if it is not in use, he cannot obtain a patent if he is not the original inventor. He is not called the inventor who has in his closet invented it, but who does not communicate it: the first person who discloses that invention to the public is considered as the inventor."

STEAD v. Williams.

On a full consideration of the subject, we have come to the conclusion that the view taken by the defendants' counsel is substantially correct; for, we think, if the invention has already been made public in England by a description contained in a work, whether written or printed, which has been publicly circulated, the patentee is not the first and true inventor within the meaning of the statute, whether he has himself borrowed his invention from such publication or not; because we think the \*public cannot be precluded from the right of using such information as they were already possessed of, at the time of the patent granted.

[ \*843 ]

The application of this principle must depend upon the particular circumstances which are brought to bear on each particular case. The existence of a single copy of a work, though printed, brought from a depository where it has long been kept in a state of obscurity, would afford a very different inference from the production of an Encyclopædia or other work in general circulation. The question will be whether, upon the whole evidence, there had been such a publication as to make the description a part of the public stock of information.

We think, therefore, that, as this question has not been submitted to the jury, there ought to be a new trial.

Rule absolute.

## IN THE EXCHEQUER CHAMBER.

1844. Feb. 3,

[ 882 ]

# WILMSHURST AND Another v. BOWKER and Another (1).

(7 Man. & G. 882-892; 8 Scott, N. R. 571; 12 L. J. Ex. 475.)

B. sold to A. wheat, the price to be paid by banker's draft on London at two months, to be remitted on receipt of invoice and bill of lading, which B. shipped by order of A., to be carried to M. for the account and at the risk of A., there to be delivered to A.; B. delivered the wheat to the master of the vessel, who took possession thereof; the master signed a bill of lading to deliver the wheat to the order of B., who indorsed the bill of lading to A., and made an invoice, and sent the invoice and bill of lading to A. in a letter, requiring A. to remit in course, which letter, with the invoice and bill of lading, were received by A. A. having received the bill of lading and invoice, and having failed to remit the banker's draft, B. assumed to revoke and rescind the sale, and caused the wheat to be stopped in its passage to A., &c.

Held, reversing the judgment of the Court of Common Pleas (2), that, by the delivery of the wheat to the master of the vessel for the account and at the risk of A., and the transmission of the indorsed bill of lading, B. had so parted with the property and right of possession, as not to be entitled to intercept the delivery.

Case for a wrongful stoppage in transitu, of wheat sold by the defendants to the plaintiffs.

The first count of the declaration stated (3), that, [on the 25th October, 1886, the defendants sold to the plaintiffs, 500 quarters of wheat, at 51s. per quarter; that on the 27th October, 1886, the defendants, by order of the plaintiffs, caused the wheat to be shipped on board of a certain vessel called the Ramsgate (W. Lightowler, master), to be carried from Lynn to Maidstone, for the account and at the risk of the plaintiffs, and there to be delivered to the plaintiffs; that the defendants then parted with the possession of the wheat, and delivered the same out of their possession to Lightowler on board of the vessel; that Lightowler made a bill of lading, and thereby acknowledged the shipping and delivery to him of the wheat on board of the vessel, and undertook to deliver the wheat to the order of the defendants; that Lightowler delivered the bill of lading to the defendants, who indorsed the same to the plaintiffs; that the defendants made an invoice of the wheat, and

(1) Cited in Fraser v. Witt, (1868) L. R. 7 Eq. 64, 70; Ex parte Catling, 29 L. T. N. S. 432. By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (2), "Where goods are shipped, and by the bill of lading are deliverable to the order of the seller or his agent, the seller is primā facie deemed to reserve

the right of disposal."-J. G. P.

(2) Reported 2 Man. & G. 792, 3 Scott, N. B. 272, 10 L. J. C. P. 161, post, pp. 808—813.

(3) The report in 7 Man. & G. sets out the first count at great length. The above is an abstract thereof.—
J. G. P.

thereby declared the wheat to be shipped on board the said vessel WILMSHUBST for Maidstone, by order, and for the account and risk, of the plaintiffs; that the defendants wrote to the plaintiffs a letter, informing the plaintiffs that they begged to hand the plaintiffs the invoice and bill of lading of the plaintiffs' order of wheat, per Captain Lightowler, and requesting that, to the amount, the plaintiffs would add the charge for insuring the wheat, and remit the same to the defendants in due course; that the defendants sent the letter with the invoice and bill of lading inclosed to the plaintiffs; that the plaintiffs received the letter, invoice, and bill of lading, and then became the owners thereof; that the defendants had notice of the premises; that, nevertheless, the defendants (the plaintiffs then being the holders of the said bill of lading, and not being bankrupts or insolvents), did not nor would suffer or permit the wheat to be delivered to the plaintiffs, but wrongfully revoked and rescinded the sale of the wheat to the plaintiffs, and then caused and procured the wheat to be stopped in its passage to the plaintiffs, and prevented the same from being delivered to the plaintiffs; whereby the plaintiffs wholly lost the wheat, and were deprived of the profits which would have arisen to them by reselling it; (the declaration then states in detail the damages the plaintiffs had suffered by reason of the non-delivery)].

The declaration contained also a count in trover.

To the first count the defendants pleaded,

First, not guilty.

Secondly, that the plaintiffs did not bargain with the defendants to buy of them, nor did the defendants sell to the plaintiffs, the wheat in the declaration mentioned at the price in that behalf therein mentioned, modo et forma—concluding to the country.

Thirdly, that, upon the said 25th of October, 1836, the plaintiffs bargained with the defendants to buy, and the defendants then sold to the plaintiffs, the quantities of wheat in the said first count mentioned, at and for the price in that behalf in the first count alleged, upon the terms and conditions for the payment thereof as follows; (that is to say), that the payment thereof should be made by banker's draft on London, at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs, of the invoice and bill of lading; that the defendants then caused the wheat to be shipped on board of the said vessel, and the possession thereof to be delivered to the said master, in pursuance of the said bargain, to be by him carried to Maidstone aforesaid, and to r. Bowker.

[ 886 ]

t. Bowker

[ \*887 ]

WILMSHUBSI be there delivered to the plaintiffs according to the said agreement and the terms and conditions thereof: that the plaintiffs, upon the day and year in that behalf in the said first count alleged, and before the committing of the supposed grievances, received the said invoice and bill of lading; but did not nor would, upon the receipt of the said invoice and bill of lading, remit or tender, or offer to remit, to the defendants any banker's draft on London for the payment of the price of the wheat, but, on receipt of the said invoice and bill of lading, wholly failed and neglected \*so to do, contrary to their said agreement in that behalf: whereupon the defendants caused and procured the wheat to be stopped, and then prevented the same from being delivered to the plaintiffs, and [sic] they lawfully might for the cause aforesaid; verification.

> The plaintiffs joined issue on the first and second pleas, and replied de injurià to the third.

1841. May 8.

[ 2 Man. & G. 798]

[(1) At the trial of the cause before Maule, J., at the adjourned sittings in London after Michaelmas Term, 1839, the plaintiffs' counsel opened the following as the facts of the case. plaintiffs are corn merchants at Cranbrook in Kent, carrying on business under the firm of John Wilmshurst and Son; and are also partners in a banking house there under the firm of Wilmshurst, Hague & Co. The defendants are corn merchants at Lynn, in the county of Norfolk. On the 25th of October, 1836, the defendants contracted to sell to the plaintiffs a quantity of wheat on the terms mentioned in the following sold note signed by the defendants. A corresponding bought note was, at the same time. signed by the plaintiffs.

"Sold, the 25th of October, 1836, to Messrs. John Wilmshurst and Son, about 300 quarters of wheat, as per sample, at 51s. per quarter on board. Payment by banker's draft on London at two months' date to be remitted on receipt of invoice and bill of lading."

[ \*799 ]

On the 27th of October, the wheat, which consisted of 310 quarters, was shipped on board of a vessel called \*the Ramsgate, W. Lightowler master, for Maidstone, deliverable "unto order, or to assigns, he or they paying freight," &c. On the same day the defendants, in pursuance of an arrangement to that effect with the plaintiffs, whereby the defendants were to charge the plaintiffs with the premium in addition to the cost price of the wheat, gave orders to their agents in London, to effect an insurance on the wheat, and

(1) From the report in 2 Man. & G. at p. 798.

to hand the policy to the plaintiffs. The defendants forwarded to WILMSHURST the plaintiffs the bill of lading, indorsed in blank, and an invoice of the wheat in a letter, wherein they requested the plaintiffs to remit to them the amount of the invoice, after having added to it the charges for insurance. The wheat was described in the invoice "as a cargo of wheat shipped on board the Ramsgate, W. Lightowler master, for Maidstone, by order, and for the account and risk, of Messrs. John Wilmshurst and Son." On the 29th, the plaintiff received the policy of insurance on the wheat from the defendant's agents, with an account of the charges thereon, amounting to 5l. 12s. 1d. On the 30th, the plaintiffs transmitted to the defendants by post a bill for 796l. 2s. 1d. (being the invoice price of the wheat and the charges for insurance), in the following form:

- "Lynn, 27th October, 1836. "796l. 2s. 1d.
- "Two months age date pay to our order seven hundred and ninety-six pounds, was shillings, and one penny, value received.
  - "Messrs. Wilks Turs and Son,
    - "Merchanis. Canbrook."

By return of post on the 1st of November, the defendants sent back this bill to the defendants, inclosed in the following letter:

"Gentlemen,—We have your favour of the 30th ult., inclosing your acceptance, which being contrary to agreement, we return. and have arranged otherwise for the disposal of the cargo."

[ 800]

On the 3rd of November, Wilmshurst, the son, wrote the following reply:

"Gentlemen,-I was much surprised at the tenor of your letter this morning. It was altogether an error of my father's in sending a bill drawn on us as merchants. However, we now send you a bankers' acceptance, and trust you will see the wheat forwarded immediately."

In this letter a bill was inclosed as follows:

- "LYNN, 27th October, 1886. " 796l. 2s. 1d.
- "Two months fight date pay to our order seven hundred and ninety-six pounds two skillings, and one penny, value received.
  - "Messrs. Wilmshar, Hague & Co.,
    - "Bankers Cranbrook."

WILMSHURST v. BOWKER.

[ \*801 ]

By the same post, the younger Wilmshurst sent a second letter to the defendants offering, in case the defendants should not be "agreeable" to take the bill last sent, to pay cash for the wheat, less the discount. The defendants, considering the second draft not to be a compliance with the terms of the contract, returned it also in a letter, repeating that the cargo was otherwise disposed of.

Immediately after they returned the first draft, the defendants got the wheat back from Captain Lightowler. They subsequently sold it at 56s. a quarter.

Upon this statement of facts the learned Judge observed that the third plea must be taken as proved, and that the only question was, whether such plea would be \*an answer to the action after verdict. It was thereupon agreed that a verdict should be entered for the plaintiffs on the first and second issues, and for the defendants on the third, with liberty to the defendants, in the event of the plaintiffs obtaining a rule for judgment non obstante veredicto on the third plea, to move that the verdict might be entered for them upon the second issue, on the ground of the misstatement of the contract in the declaration (the omission of the stipulation as to the terms of payment); the Court to have the same power of amendment as the Judge at Nisi Prius.

The damages were assessed contingently at 77l.

Butt having obtained in Hilary Term, 1840, a rule nisi for judgment non obstante veredicto, on the third plea,

Greenwood showed cause. \* \* \*

[ 807 ] Butt, in support of the rule.

Cur. adv. rult.

[ \*810 ] Tindal, Ch. J. now delivered the judgment of the Court:

This action comes for a second time before us on a question now raised upon the third plea to the first count of the declaration, the plaintiffs contending that notwithstanding the verdict which has been found for the defendants on the issue raised upon that plea, they are entitled to demand the judgment of the Court in their favour upon such first count. That count states, in substance, that the defendants sold to the plaintiffs a certain quantity of wheat at a certain price; that the defendants, by order of the plaintiffs, shipped the same on board a certain vessel, to be carried to Maidstone for the account and on the risk of the plaintiffs, there

to be delivered to the plaintiffs; that the defendants \*parted with WILMSHURST the possession of the wheat, and delivered the same out of their possession to the master of the vessel, who received the same, and had the possession thereof, for the purposes last aforesaid; that the master signed a bill of lading to deliver the said wheat to the order of the defendants; and that the defendants indorsed such bill of lading to the plaintiffs, and signed an invoice of the wheat, and sent the invoice and bill of lading, so indorsed, to the plaintiffs in a letter, requiring them to remit the amount of the invoice and the charges of insurance in course; which letter, with the invoice and bill of lading so indorsed, were received by the plaintiffs; and the declaration then assigns, as a breach of the contract, that the said plaintiffs being the holders of the said bill of lading and not being bankrupts or insolvents, but being lawfully entitled to have the wheat delivered to them, the defendants, without the licence and against the will of the plaintiffs; revoked and rescinded the sale, and caused the wheat to be stopped in its passage to the plaintiffs, and forthwith upon such stoppage, and without giving notice of their intention, hindered the wheat from being delivered to them, per quod, they sustained the special damage set out in the first count of the declaration.

The third plea to this count alleges, in substance, that the plaintiffs bought, and the defendants sold, the wheat in the first count mentioned, at the price therein mentioned, upon the terms and conditions for the payment thereof as follows: namely, "that the payment thereof shall be made by banker's draft on London at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading;" that the plaintiffs received the invoice and bill of lading, but did not, on such receipt thereof, remit, or offer to remit, to the defendants any banker's draft on London for payment of the price, but \*failed and neglected so to do, contrary to their said agreement, whereupon the defendants caused the wheat to be stopped, and

The question therefore is, whether after the sale of the wheat to the plaintiffs, and such constructive delivery thereof to them as is stated in the declaration, the defendants were justified in stopping the wheat in transitu, upon the ground set forth in the plea.

prevented the same from being delivered to the plaintiffs, as they

lawfully might.

That the defendants cannot justify the stoppage of this wheat in transitu, upon the ordinary ground on which such right is exercised, BOWKER. F \*811 1

[ \*812 ]

BOWKER.

[ \*813 ]

WILMSHURST may be readily admitted. The ordinary right of countermanding the actual delivery of goods shipped to a consignee, is limited to the cases in which the bankruptcy or insolvency of the consignee has taken place. The law as to this point is very clearly laid down by Lord Stowell, in the case of The Constantia (1), and in many cases in the common law reports (2): and as, in the present case, the first count directly alleges that the plaintiffs were neither bankrupt nor insolvent at the time when the stoppage took place, and as no traverse is taken upon this allegation, it must be taken that the common ground of stopping in transitu is wanting in the present case. But the question in this case is, whether, under the particular terms of this contract, the consignors have not reserved to themselves the power of withholding the actual delivery of the wheat, until the consignees should comply with the mode of payment stipulated by the contract. There is no doubt that the property in the wheat passed to the plaintiffs under the contract, upon which point much of the argument before us has turned; but the question is, as to the intention of the parties, as evidenced by the contract, with reference to the delivery of possession. \*And we are of opinion, that the intention of the parties, under this contract, was, that the consignors should retain the power of withholding the actual delivery of the wheat, in case the consignees failed in remitting the banker's draft, not upon the delivery of the wheat, but on the receipt of the bill of lading; which, in the ordinary course of business, would precede the arrival or delivery of the wheat. And we think the object of making the receiving of the invoice and bill of lading and the remitting of the banker's draft to be simultaneous or concurrent acts, could have been no other than to afford security to the consignors, so that in case the consignees failed in the performance of the latter stipulation, the consignors might withhold the actual delivery of the cargo. When goods are sold, and nothing is said about the time of delivery or the time of payment, the seller is bound to deliver them whenever they are demanded on payment of the price; "but the buyer," as is observed by Mr. Justice BAYLEY in Bloxam v. Sanders (3), "has no right to have the possession of the goods until he pays the price." In the present case, it is part of the stipulation that something shall be done by the buyer before the time when, in the usual course of business, the goods can be actually delivered; namely,

<sup>(1) 3</sup> Rob. Adm. Rep. 321.

<sup>(2)</sup> Vide 2 Nev. & M. 644.

<sup>(3) 28</sup> R. R. 219 (4 B. & C. 948; 7 Dowl. & Ry. 405).

upon the handing over of the bill of lading to the buyers, which WILMSHURST ordinarily precedes the arrival of the ship; so that the right to the possession of the goods could not vest until the buyers either remitted, or tendered or offered to remit, the bankers' draft in pay-And we think this view of the case not inconsistent with the judgment of the Court in Walley v. Montgomery (1); in which, although it was held that the consignors had no right to stop in transitu, it is to be observed, that the consignees had never refused to accept the bills which had \*been drawn on them for the price of the timber, but, on the contrary, were ready and offered so to do; nor, indeed, does it appear in that case to have been a condition that the bills should be accepted at any certain time before the actual delivery. In the present case, we hold, that upon the proper construction of the plea, the contract of sale, entered into between the parties, was conditional as to the right of possession of the cargo; and that the condition not having been performed on the part of the plaintiffs, the consignees, the defendants, the consignors were justified in preventing the wheat from being delivered.

BOWKER.

f \*814 1

Rule discharged.]

The plaintiffs brought a writ of error, and assigned errors, which 1844. were now argued before Lord Abinger, C. B., Parke, B., Patteson, 7 Man. & G. J., Alderson, B., Coleridge, J., Rolfe, B., Wightman, J.

## M. D. Hill (with whom was Butt), for the plaintiffs:

This action was brought against the defendants below, who are also the defendants in error, for wrongfully stopping in transitu wheat sold by them to the plaintiffs.

The first question is, whether, after the constructive delivery stated in the declaration, the defendants could stop the wheat in transitu, upon the grounds set forth in the third plea. That the property in the wheat vested in the plaintiffs, is clear: and the stoppage cannot be justified on the ordinary ground, which, as stated in the judgment of the Court below, is limited to cases of bankruptcy or insolvency in the vendee. The contract between the parties cannot be put higher than this-that the defendants were not bound to part with the possession of the bill of lading until they had received a banker's draft.

[ 888 ]

(PARKE, B.: They might have indorsed the bill of lading specially,

(1) 7 R. R. 526 (3 East, 585).

[ \*889 ]

WILMSHURST or they might have transmitted it to an agent, with instructions to BOWKER. hand it over to the plaintiffs against the banker's draft.)

By the general indorsement and delivery of the bill of lading, the defendants waived the condition and destroyed their right to stop in transitu. But the provision as to the banker's draft was inserted merely for the purpose of fixing the terms, and the time of payment. It was not \*intended to operate as a condition precedent. Upon the defendants' construction there would be an inconsistency in the terms of the contract: the banker's draft could not be sent until after the arrival of the bill of lading and invoice.

(LORD ABINGER, C. B.: An uncertain sum, viz. the amount of the insurance, was to be added to the invoice price.)

(PARKE, B.: The property vested in the plaintiffs on the delivery of the wheat to Lightowler.)

The delivery of Lightowler, and the transmission of the bill of lading indorsed, gave the plaintiffs both the property and the possession, subject to be devested in the event of bankruptcy or insolvency—by analogy to the doctrine of revendication. If the master refused to re-deliver the wheat to the defendants, they could have had no remedy against him. [Here, he was stopped by the COURT.]

### Greenwood, for the defendants:

The contract was a contract of sale upon special terms which [ \*890 ] have not \*been complied with. The rule that a delivery to a carrier for the account and risk of the vendee, is a delivery to the vendee himself, subject to the vendor's right to stop the goods in transitu in case of insolvency or bankruptcy, applies only where there are no special terms of payment. This case has been twice before the Court of Common Pleas, and on both occasions it was held that the intention of the parties, to be collected from the terms of the contract was, that the remitting of the banker's draft and the receipt of the bill of lading and invoice should, at least, be simultaneous acts. A third party to whom the bill of lading had been indorsed for value, would have been entitled to the possession of the wheat notwithstanding the plaintiffs had failed to remit the banker's draft: but it is otherwise as between the original parties.

(Lord Abinger, C. B.: No doubt, where goods are sold upon a WILMSHUBST condition (1), the property does not vest until the condition is BOWKER. performed.

ALDERSON, B.: You infer that, when the plea does not state that it was part of the contract that the property should not vest in the vendees until they had remitted a banker's draft.

PARKE, B.: Or rather a right to retake the goods on breach of a condition subsequent.)

In Brandt v. Bowlby (2), the facts were very much like those of the present case, and it was held that by reason of the breach by the vendees of their engagement to accept bills for the price, the property did not vest.

(LORD ABINGER, C. B.: There the goods remained in the hands of the vendor's agent.

PARKE, B.: In Ogle v. Atkinson (3), A. being indebted to the plaintiff, accepted an order to purchase goods for him at Riga, and put them on board the plaintiff's vessel,-which was sent for them,—as the plaintiff's goods, advised him of the shipment for the plaintiff's \*risk and on his account, and remitted him the invoices: he procured the master to sign bills of lading to the order of blank, assuring him it was immaterial: he then drew on the plaintiff, and transmitted the bills of exchange and bill of lading to an agent in this country, with instructions, that, if the plaintiff did not accept the bills of exchange, the agent should indorse over the bill of lading to the payee of the bills of exchange, which was accordingly done: and it was held that the property was changed by the delivery of the goods on board the plaintiff's ship, and that the subsequent indorsement of the bill of lading was inoperative. Here the goods were shipped, upon the account and risk of the plaintiffs, and were made deliverable to them. If I drew any inference from the plea, it would be that which the plaintiffs draw.)

The sale being subject to a condition which has never been performed, the plaintiffs never had the right of possession. If the wheat had come into the actual possession of the plaintiffs, the

(1) Q. d. upon a condition precedent. (3) 15 R. R. 647 (5 Taunt. 759 1

(2) 36 R. R. 796 (2 B. & Ad. 932). Marsh. 328).

[ \*891 ]

We are quite unanimous: and, however reluctant we may be to

f \*892 ]

WILMSHURST plaintiffs might have maintained trover: Bishop v. Shillito (1),

BOWKER. Walley v. Montgomery (2), is the converse of this case.

LORD ABINGER, C. B.:

overturn a considered judgment of the Court of Common Pleas, we find ourselves unable to come to any other conclusion than that the plaintiffs are entitled to recover. We accede to the general principle, laid down by the Court below; and if the facts had been before a jury, we are not prepared to say that they might not have drawn the inference that the remitting of a banker's draft was a condition precedent to the vesting of the property in the wheat in the plaintiffs. But we draw no such inference from what appears upon the record. The delivery of \*the bill of lading and the remitting the banker's draft could not be simultaneous acts: the plaintiffs must have received the bill of lading and invoice before they could send the draft. The default on the part of the plaintiffs amounts to no more than this, that they have omitted to perform one part of their contract.

## ALDERSON, B.:

It is quite consistent with the decision of the Court of Common Pleas that the remitting the banker's draft was a condition subsequent.

At the trial damages had been assessed contingently: But, this not appearing upon the record, a discussion arose as to whether a writ of inquiry should be awarded. \* \* \*

The Court directed a simple judgment of reversal to be entered, leaving it to the Court below to award an inquiry of damages.

Judgment reversed.

(1) 20 R. R. 457, n. (2 B. & Ald. (2) 7 R. R. 526 (3 East, 585). 329, n.).

## IN THE COURT OF COMMON PLEAS.

### CAUNCE v. SPANTON.

1844. Nov. 6.

(7 Man. & G. 903-904; S. C. nom. Cannee v. Spanton, 8 Scott, N. R. 714; 14 L. J. C. P. 23; 8 Jur. 1008.)

\_\_\_\_\_ [ 903 ]

In trover, a demand and a refusal on the ground of a claim of right by a third party, is evidence of a conversion.

TROVER, for a cart. Plea, not guilty, under which, it had been agreed, under a Judge's order, that the defence of lien might be set up. A summons had been taken out by the defendant to add a plea of "not possessed" (1), which summons had been dismissed by an order of Tindal, Ch. J., upon the terms above stated.

[ \*904 ]

At the trial before Cresswell, J., at the sittings for London after last Term, the evidence of the conversion was, that the plaintiff demanded the cart of the defendant (upon whose premises it had been standing), and at the same time offered to pay whatever might be due for the standing; but that the defendant refused to deliver it up, upon the ground that one Bartlett was a part-owner of it (2), and that he had given the defendant an indemnity. The learned Judge ruled that this was sufficient evidence of a conversion; and the plaintiff obtained a verdict, damages 16l.

Byles, Serjt. now moved for a new trial, upon the ground of misdirection. He submitted that demand and refusal is not evidence of a conversion where the party has a lien upon the chattel: Stancliffe v. Hardwick (3).

(MAULE, J.: Here the ground of refusal is a claim of right on the part of Bartlett.)

#### Per Curiam:

Rule refused.

(1) Supposing "not possessed" had been pleaded, quære whether upon proof of a joint possession in the plaintiff and Bartlett, the defendant would not have been entitled to a verdict, on the ground that an allegation of seisin or of possession, generally, must be taken to import an assertion of sole seisin or sole possession. See Edwards v. Bishop of Exeter,

50 R. R. 826 (5 Bing. N. C. 660).

(2) The refusal being accompanied by a statement of the ground of that refusal, quære whether the allegation of part-ownership would not have been evidence under a plea of "not possessed," to negative the sole possession.

(3) 2 Cr. M. & R. 1; 5 Tyr. 551; 3 Dowl. P. C. 762.

1844. Nov. 15.

[ 969 ]

## RANNIE v. IRVINE (1).

(7 Man. & G. 969—979; S. C. 8 Scott, N. B. 674; 14 L. J. C. P. 10; 8 Jur. 1051.)

The assignor of a lease and the goodwill of the business of a baker, agreed that he would not, during the term assigned, solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent of the assignee: Held, not would as an unreasonable restraint of trade.

The declaration stated, that, before and at the ASSUMPSIT. time of the making of the agreement thereinafter mentioned, the defendant was possessed of a certain house, shop, and premises. with the appurtenances, situate in the county of Middlesex, and called No. 35, Berner's Street, for the residue of a certain term of years therein, to wit, a certain term to expire on the 29th of September, 1848, and was there carrying on the trade and business of a baker; that on the 1st of July, 1842, by a certain agreement then made &c., it was agreed by and between the plaintiff and the defendant, that, in consideration of the sum of 850l. to be paid to the defendant by the plaintiff at the times and in manner thereinafter mentioned, the defendant should sell and assign the then remainder of his said term in the said house and shop, to the plaintiff, and should forthwith procure from his, the defendant's, landlord, at his own expense, a lease of the said premises for the term of fourteen years from the expiration of the then term; and that the defendant should, for the consideration aforesaid, make and execute an assignment to the plaintiff of the goodwill of the baking business then carried on by him as aforesaid upon the said premises, and also of all the fixtures and trade utensils in and about the said premises, then belonging to the defendant; and the plaintiff then agreed to accept such conveyance and assignment on the terms aforesaid; and the defendant then further agreed, for the consideration aforesaid, that he would not set up or carry on, directly or indirectly, during \*the remainder of the then present and the whole of the intended new term, the business of a baker, with [sic] one mile of the said premises, under the payment of the sum of 200l., to be sued for and recovered by way of liquidated damages, for each and every month in which the defendant should commit any breach of the last-mentioned agreement; and also that the defendant would not, during the said remainder of

[ \*970 ]

<sup>(1)</sup> See Baines v. Geary (1887) 35 Ch. D. 154, 156; 56 L. J. Ch. 935; Nordenfelt v. Maxim Nordenfelt Guns

and Ammunition Company [1894] A.C. 535, 574; 63 L.J. Ch. 908.

the then term, and the whole of the intended new term, solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the said premises No. 35, Berner's Street, without the consent in writing of the plaintiff for that purpose first obtained, under the penalty of 2001., to be sued for and recovered as liquidated damages, for each infraction: and that possession of the said premises should be given and taken Mutual promises: Averment of performance on the plaintiff's part: that the defendant afterwards, to wit, on the day and year last aforesaid, procured from the landlord of the said premises, to wit, W. J. Roper, a lease of the said premises for the term of 151 years from the 24th of June, 1842, and then executed an assignment to the plaintiff of the last-mentioned term and interest in the said premises, in lieu of the said assignments of the said residue of the said term and of the said new lease in the said agreement mentioned, and the plaintiff then accepted of such assignment in lieu of the said assignments in the said agreement mentioned: Breach, that, after making the said agreement, and after possession of the said premises had been given and taken under the said agreement, and after the assignment of the lastmentioned term, and during the continuance thereof, and during the period in the agreement in that behalf mentioned, to wit, on the 17th of June, 1843, the defendant did knowingly supply bread to one Thompson, being one of the customers before and at the time of the said agreement \*dealing at the said premises No. 35. Berner's Street, without the consent in writing, or otherwise, of the plaintiff, contrary to the said agreement; and did also, after making the said agreement &c. (stating the supply of bread to one Brock, another customer): and that by means of the several premises the defendant had become liable to pay to the plaintiff the several sums of 200l. and 200l. in the said agreement mentioned, &c.

Special demurrer assigning for causes (amongst others), "that the agreement in the declaration mentioned, for the breaches of which the plaintiff therein complains, is, that the defendant should not knowingly supply bread or flour, as therein mentioned, during the remainder of the then present and the whole of the intended new term, such intended new term being a term of fourteen years to commence from the 29th of September, 1843, and then it is alleged in the declaration, that the defendant, during the continuance of the said then present term, obtained the grant to himself of a new lease from the 24th of June, 1842, which he

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[ \*971 ]

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[ \*972 ]

assigned to the plaintiff, and that, during the continuance of this last-mentioned term, as assigned, he knowingly supplied bread as in the declaration mentioned; but, the term subsisting at the time of the making of the agreement declared on having been merged and extinguished by the grant of a longer term, it is not shown, nor does it appear, in or by the declaration, that the said breaches by the supplying of bread as aforesaid were committed within the term so subsisting at the time of the making of the agreement declared upon, or within the intended new term in the said agreement mentioned, but the contrary does in fact appear and is shown in and by the declaration: and that the said agreement declared on is contrary to public policy, and illegal, in this respect, amongst others, that is to say, that it \*restrains the defendant from supplying bread and flour to particular persons wherever they may reside, without limit in point of space as to those persons, and under all circumstances, whether such persons change their residences or continue customers of the plaintiff, or not; which is a restraint larger and wider than the protection of the plaintiff can possibly require, and the same must therefore be considered as unreasonable and void in law," &c.

## Byles, Serjt. in support of the demurrer:

Admitting the first part of the contract to be good, in which the defendant agrees not to set up the business of a baker within a mile of his former residence, the latter part of the contract is illegal and contrary to public policy, being, to an unnecessary and unreasonable degree, in restraint of trade. By it, the defendant binds himself during the term, not to solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent in writing of the plaintiff, under the penalty of 2001., to be recovered as liquidated damages, for each infraction. This is not a restriction, not to deal with certain customers by name, or within a defined locality; which may be good; as in Hunlocke v. Blacklove (1), where the agreement was not to trade with particular customers by name: but it is a contract, generally, not to deal with the customers in whatever part of the kingdom they may reside. In Ward v. Byrne (2), the defendant gave a bond to the plaintiff (a coalmerchant in London, conditioned (inter alia) that the defendant should not, within two years after leaving the plaintiff's service,

solicit, or sell to, any customers of the plaintiff; that he should not follow, or be employed in, the business of a \*coal-merchant, for nine months after he should have left the employment of the plaintiff; and that he should not leave his employment without giving a month's notice. The Court, on motion to arrest the judgment, held the bond to be void, on the ground that it was a restraint of trade unlimited in point of space.

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Ø
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(ERLE, J.: Was not the distinction taken in that case between all the world and particular customers?)

Here, the restraint is clearly unreasonable. Supposing the customers to remove from the plaintiff's neighbourhood, to a small town in the country, where the defendant might be the only baker; under this agreement he would be precluded from supplying them. Further, the breach assigned was not committed during the then present or the intended term; but during the substituted term. The question is whether "term" is to be read as a period of time, or as an estate. It is submitted that "term" denotes the "term of years," the "interest" or "estate," and not time only.

(TINDAL, Ch. J.: What was the meaning of the parties? In this agreement term and time are convertible terms.)

Channell, Serjt., contrà:

This contract is not void as being in restraint of trade. [He read the rule as laid down in Hunlocke v. Blacklowe (1), citing Prugnell v. Gosse (2), Mitchell v. Reynolds (3), and Chesman v. Nainby (4).] Hitchcock v. Coker (5) is conclusive of the present case, in principle, if not in precise terms. \* \* Here, the restraint is not larger than was necessary, as was the case in Mallan v. May (6), and only carries out what clearly must have been the intention and calculation of the parties; neither is it of such an extensive nature as the restraint in Proctor v. Sargent (7), which this Court held to be free from objection. It is true that here the customers are not referred to by name, as in Hunlocke v. Blacklowe: but the restriction is confined to customers then dealing at the premises, and there was no occasion to particularise them. In calculating the price to be paid for the goodwill, reference must of necessity have been

(1) 2 Wms. Saund. 156.

(5) 6 Ad. & El. 438; 1 Nev. & P. 796.

(2) All. 56.

(6) 63 R. R. 708 (11 M. & W. 653).

(3) 1 P. Wms. 181.

(7) 58 R. R. 342 (2 Man. & G. 20);

(4) 2 Ld. Ray. 1456; 3 Br. P. C. 2 Scott, N. B. 289.

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[ 975 ]

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[ \*976 ]

had to the number of persons who dealt at the shop. The plaintiff agreed to be content with the limit of one mile from the premises upon the defendant undertaking not to serve his former customers.

(Tindal, Ch. J.: Suppose the customers to remove to a distant part of London? The restraint would remain, although the necessity for it would cease.)

The same objection might be taken where the customers are named, as in *Hunlocke* v. *Blacklowe*. *Gale* v. *Reed* (1) is in point. *Ward* v. *Byrne* is clearly distinguishable from the present case. Here, the defendant has power to set up trade anywhere beyond the \*limit of a mile from his former premises, upon the restriction that he shall not supply any of his old customers, which is no more than is reasonable and necessary for the protection of the plaintiff.

Byles, Serjt., replied.

TINDAL, Ch. J.:

Upon the best construction I can put upon this agreement, it does not appear to me to be such a contract in restraint of trade as to compel us to hold it void. The first part of the agreement -that the defendant would not directly or indirectly set up or carry on during the term the business of a baker, within one mile of the premises disposed of—is admitted to be good. But it is contended that the latter branch of the agreement, whereby the defendant engages "that he will not, during the said term, solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the said premises, without the consent in writing of the plaintiff," is such a restriction upon the defendant's right to trade as renders the agreement void as being contrary to public policy. In the first place, it is to be observed that this is not a general restraint of trade, but only restricts the defendant from trading with a very limited number of persons whose names were well known to him at the time he entered into the contract; and it would not carry the case further than the first part of the agreement, provided the customers continued to reside in the same But, it is argued that the customers may remove into another district, and that this contract would prevent the defendant from supplying them with bread and flour whithersoever they might go, although they might not be able to obtain so necessary

an article as bread from any one else. If however, the contract is a reasonable one at the time it is entered into, we are \*not bound to look out for improbable and extravagant contingencies in order to make it void. It does not seem to me, that, in holding this contract to be good, we shall be at all extending the doctrine laid down in the note to Hunlocke v. Blacklowe (1). Undoubtedly, in that case (where the point was not taken, probably because the very learned person by whom it was argued did not think it tenable) the customers were named in a schedule. That makes no substantial difference; for here, the names of the customers would all appear in the defendant's book, and the restraint was virtually limited to a given number of persons ascertained and agreed upon by the parties at the time. I therefore think our judgment must be for the plaintiff.

RANNIE e. IRVINE. [ \*977 ]

## COLTMAN, J.:

I entirely agree that restrictions of this nature ought not to be extended beyond what is necessary for the fair and reasonable protection of the vendee. In the present case, I think it is only reasonable that the vendor should be restrained from dealing with his old customers. It is true remote and improbable cases may be put in which inconvenience might result from such a contract; but we ought not to indulge in such suppositions, but rather confine ourselves to looking at what is likely to occur. Hunlocke v. Blacklowe was open to the same objection; but neither the Court nor the learned person who there argued for the defendant, suggested that the contract was void as being in restraint of trade. And the same view is adopted by Mr. Serjeant Williams.

## MAULE, J.:

The general rule against covenants in restraint of trade is founded upon this, that the law favours trade for the sake of the public, and not for the sake of the parties engaged in it. And the reason of \*the exception engrafted upon that rule, is, that the exception is in furtherance of the rule itself. If it were held that a party selling the goodwill of a business could not restrain himself from using for his own profit that which he has agreed to sell, that would operate as a restraint of a very injurious kind. But it is objected here that the restraint goes beyond the limit allowed by the law, and what is necessary for the effectual security of the

[ \*978 ]

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[ \*979 ]

vendee. The provision is, that the defendant shall not, during the term, solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent in writing of the plaintiff. That must receive a reasonable construction. For instance, it cannot be held to apply to a dealing in any other trade than that of a baker; nor do I think that the giving bread to an old customer in the way of charity, would be an infraction of the contract: and yet both of these cases would fall within the literal construction of the contract. If, then, we are to give it a reasonable construction, such construction would probably exclude the case that has been put, of this baker and some of his old customers going to some distant spot where bread would be procurable only from him. The possibility that some such extravagant case may occur, will not make a restriction unreasonable that is otherwise reasonable and just.

## ERLE, J.:

I also am of opinion that this contract is valid. In the case of the sale of the goodwill of a trade, nothing is more reasonable than that the assignor shall be restrained from getting back any of the customers he has assigned. That I take to have been the intention of the parties in the present case. Extreme cases may be suggested, in which inconvenience might result from such a contract: but so far as principle is concerned. I think the plaintiff is entitled to our judgment. \*It is true that the point was not raised in Hunlocke v. Blacklowe: but there can be little doubt that the attention of the Court would have been called to it, if the counsel for the defendant had felt it to be tenable. In Ward v. Byrne, the party was restrained in the most ample manner; and it is remarkable, that during the discussion which that case underwent, this objection was It appears, therefore, that in both of these cases it never made. was passed by as untenable

Judgment for the plaintiff.

Byles, Serjt. applied to amend, by withdrawing the demurrer, and pleading to the action. He submitted that this indulgence was only reasonable, seeing that the point had never been distinctly determined before.

Channell, Serjt., contrà:

The defendant, if allowed to amend, should undertake not to bring error.

Tindal, Ch. J.:

Rannie v. Irvine.

Giving such an undertaking, and pleading issuably, he may amend, on payment of costs.

Rule accordingly (1).

# DOE D. MORGAN, WILLIAMS AND WAYNE v. POWELL.

1844. April 17. Nov. 16.

[ 980 ]

(7 Man. & G. 980—994; S. C. 8 Scott, N. R. 687; 14 L. J. C. P. 5; 8 Jur. 1123.)

By a memorandum made on the 2nd of February, A. agreed to let and grant a lease to B. of "the coal, iron-mine, stone, and fire-clay," under certain lands, at certain specified royalties, for the term of seventy years; and it was provided that so much royalties as would amount to 50l. a year should be worked or paid for during the term; the rent to commence in a year from the time a pit was sunk; with power to work the minerals, and to deposit rubbish, and make a wharf, as usually granted in leases of a similar nature, and as granted by C.; and to abandon and quit the same, if at any time during the term B. should think fit, on giving six months' notice; to commence sinking a pit before the 24th of June; and A. engaged that he had not incumbered such estate; to contain the usual covenants, and as entered into by C., and A. engaged to sign a lease upon the said terms as soon as it could be prepared: Held, that this was not a lease, but an agreement for a demise in futuro (2).

Whether an instrument is to operate as a lease or an agreement, depends upon the intention, to be collected from the instrument, and from the nature and condition of the subject-matter, without reference to extrinsic circumstances or subsequent acts.

EJECTMENT, for coal-mines and iron-mines at Aberdare, in the county of Glamorgan.

At the trial before Maule, J., at the last Spring Assizes for the county of Glamorgan, the following facts appeared.

The defendant was in possession of the mines by conveyance

(1) Some confusion appears to arise in cases of this description from the use of the term "consideration." As between the assignor or assignee of a trade or business, any consideration which would support a promise would be sufficient; and in case of an assignment by deed, the solemnity of sealing and delivery would be a sufficient consideration; but as an injury is prima facie done to the public by a contract whereby one of the parties is restrained from trading, such a contract is void, unless something appears which shows that the restraint is required for the reasonable protection of the vendee; thereby preventing the

greater injury which would result to the public if parties could not, with safety to a purchaser, transfer their interests in any particular trade or business.

(2) The distinction between a lease and an agreement for a lease is not now as important as formerly, as for many purposes an agreement for a lease specifically enforceable is equivalent to a lease (see Walsh v. Lonsdale (1882) 21 Ch. D. 9; 52 L. J. Ch. 2); but the distinction is still of some importance (see Foster v. Reeves [1892] 2 Q. B. 255; 61 L. J. Q. B. 763; Swain v. Ayres (1888) 21 Q. B. D. 289; 57 L. J. Q. B. 428).—J. G. P.

DOE d.
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t.
POWELL.

[ \*981 ]

from Morgan T. David, under whom the lessors of the plaintiff also claimed, relying upon an instrument,—signed by the respective parties thereto, but not under seal,—of which the following is a copy:

"February 2nd, 1838. Morgan T. David hereby agrees to let, and grant a lease to George R. Morgan, Edward M. Williams, and Thomas Wayne, the coal, iron-mine, stone, and fire-clay under Abernant y Gros y Shaf and Tyr Bach, with all the mines belonging to him, in the parish of Aberdare, thereunder, at the following rate per ton, viz. 9d. per ton, for every ton of coal, customary weights for shipping purposes, as usually let in the \*county of Monmouth; 1s. per ton, for mine, the usual weight in the parish of Aberdare; and for clay and stone, the same that William T. David is paid for, as well as the coal and mine, for the term of 70 years from this 2nd day of February; and that so much royalties as will amount to 50l. a year, be worked, or paid for, during the term, which rent is to commence in a year from the time the pit is sunk through the four-foot coal; with power to work the said minerals, and to deposit rubbish, and make a wharf, as is usually granted in leases of a similar nature, and by William T. David: Nevertheless, if at any time during the term the said George R. Morgan, E. M. Williams, and Thomas Wayne should think fit, from the quality of coal being unsound, or from faults, on giving six months' notice, to abandon and quit the same as if this agreement had never been entered into. And we hereby bind ourselves to commence sinking a pit before the 24th of June next. And the said Morgan T. David engages that he has not incumbered the said estate, to prevent him entering into a lease on the above terms and agreement; which lease is to contain the usual covenants, and as entered into by his brother.

"The said Morgan T. David to be allowed 1d. per ton for all minerals brought from other properties through the pits on his land. And the said Morgan T. David engages to sign a lease upon the said terms, as soon as it can be prepared."

Shortly after the execution of the instrument, the lessors of the plaintiff commenced sinking a shaft. No rent had been paid.

For the defendant, it was contended that this instrument was a mere agreement to execute a lease in futuro.

For the plaintiff, that it amounted to an actual present demise; and the lessors of the plaintiff put in a letter from Morgan T. David, in which he so treated it.

[ \*982 ] The learned Judge held that the instrument so signed \*was only

an agreement; and directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict.

DOE d. MORGAN v. POWELL. April 17.

Sir T. Wilde, Serjt., in Easter Term last, moved accordingly, referring to Bacon's Abridgment (1), Poole v. Bentley (2), Pinero v. Judson (3), Bicknell v. Hood (4), Doe v. Benjamin (5). He suggested that the facts should be stated in a special case. A rule nisi being granted, and the suggestion not being adopted,

Talfourd, Serjt. (with whom was Byles, Serjt.), now showed cause:

The question is, what was the intention of the parties, as declared by the written instrument, regard being had to the nature and condition of the subject-matter: Perring v. Brook (6). insertion of a clause providing for the execution of a formal lease, will not prevent an instrument from operating as an actual demise, where it is contemplated that the parties shall have immediate possession. But, though there are words of present demise, yet, if on the face of the instrument, the intent of the parties appears to be that the possession shall not pass until a lease has been executed, it will operate only as an agreement: Morgan d. Dowding v. Bissell (7). Agreements relating to mining property have never been held to operate as present demises. The point arose in Jones v. Reynolds (8). \*The correspondence in that case ascertained the terms of the holding with much greater precision than the instrument now before the Court, which was evidently intended as the basis of a lease by which the terms of the tenancy are to be fixed. It is to be a demise, not of the surface, but of the minerals only, or a grant of a licence to work them.

[ \*983 ]

(Tindal, Ch. J.: A demise of the minerals before they are dug is a demise of the realty: the whole coal, iron-mine, stone, and fire-clay are expressly mentioned as the subject of the demise.)

There is no stipulation as to the possession, except that the lessees bind themselves to commence sinking a pit before the 24th of June. no rent is to become payable until a year after the pit is sunk

- (1) Leases and Terms for Years (K).
- (2) 12 East, 168.
- (3) 31 R. R. 388 (6 Bing. 206; 3
- Moo. & P. 497).
  - (4) 5 M. & W. 104.

- (5) 9 Ad. & El. 644; 1 P. & D. 440.
- (6) 1 Moo. & Rob. 510.
- (7) 3 Taunt. 65.
- (8) 55 R. R. 333 (1 Q. B. 506).

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through the four-foot coal, which may never happen: there is no engagement that the mines should be effectually worked: and no stipulation as to the place where or the mode in which the rubbish should be deposited and the wharf made.

(MAULE, J.: An interest in incorporeal hereditaments is to pass.

ERLE, J.: Which can only be by deed: Bird v. Higginson (1).)

The lease is to contain the usual covenants. In the mining districts in Staffordshire and Monmouthshire, leases containing covenants of the most special description, are usual,—providing for rights of entry on the surface of the land, compensation for surface damage, and the restoration of the land to its original state at the end of the term, and the like. The royalty does not appear to be described with sufficient certainty to be made the subject of a distress. Does the expression "for clay and stone, the same that William T. David is paid for," mean that paid for at the present moment, or during the last year of the term? Every circumstance which has been held to show a contract not to amount to a present demise, is to be found \*here. It would be difficult, in any case, to find stronger reasons for holding this to be merely an agreement for a future lease.

[ \*984 ]

Sir T. Wilde, Serjt. (with whom were Channell, Serjt. and E. V. Williams):

Any instrument which gives a right of possession, is a lease. is not material that the terms of the instrument are uncertain with reference to particular objects. It should be looked at with reference to the general intent. Whether this instrument is to operate as a lease or as an agreement, the term is to commence from the date of the instrument. It is to be a term of seventy years "from this second day of February." The precise time is fixed for the lessees to commence their operations. Power is given to the lessees to determine the whole interest. That power, it is submitted, might be exercised before the more formal lease was executed. It is exercisable at any time during the term. The intention of the parties is to be looked at without regard to technical expressions. It seems to be inferred that the parties did not know what the custom of mining was: but the document leads to the opposite conclusion. It frequently happens that a man intending to create an under lease, executes an instrument which is construed to enure as an assignment (1). The Courts have held. "let" and "agree to let." to be equivalent terms. lease were now granted it must commence at the same time as mentioned in this instrument. It may be admitted that a future lease was contemplated. The point relied on by the defendant,that the intention of the parties must govern the construction of the instrument \*is in the plaintiff's favour. Whether the lessees are entitled to a covenant or grant, to enable them to do acts necessary for the proper working of the mines, may be doubtful; but, in this case, that point is not material; if a lease were now to be granted, it would be as uncertain as the agreement already in force, if extrinsic circumstances are to be taken into consideration. The lessor came backwards and forwards, and saw what the lessees were doing.

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[ \*985 ]

The words "as soon as it can be prepared," point to no specific time. A notice not to use the property until a lease should have been granted, would have been null and void. It is the practice to admit the statements of the parties as to the sense in which they executed an instrument. If this instrument is so construed that an interest could not pass, it will have an effect totally different from the intention of the parties. The lessor did not mean to grant a licence to work the mines, but to create an actual demise.

(MAULE, J.: "All the mines belonging to him thereunder," could hardly be meant to refer to mines already open.)

If possible, effect is to be given to all the words which are used. It is said that whatever words are sufficient to explain the intent of the parties—that the one shall divest himself of the possession, and the other come into it for a determinate time—such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose (2). [He referred to

(1) A lessee who subdemises for a term commensurate with his own, has, by an ingenious application of the principle of the Statute of Quia Emptores to chattel interests, or by an assumption that the principle existed at common law, been considered, upon the authority of an

incorrect abridgment of an obiter dictum by FINCHDEN, Ch. J., as assigning his whole term, his intention really being to create a derivative interest under it. Vide 5 Man. & Ry. 158.

(2) Bac. Abr. title Leases (K).

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Poole v. Bentley (1), Doe d. Walker v. Grooves (2), Doe d. Phillip v. Benjamin (3), Doe d. Pearson v. Ries (4), Doe d. Jackson v. Ashburner (5), Barry v. Nugent (6) and Morgan v. Bissell (7).]

[986] Channell, Serjt. on the same side, [cited Jones v. Reynolds].

(ERLE, J.: Might there not be an agreement for a lease, and in [\*987] the mean time a tenancy at \*sufferance?(8).)

Such a tenancy arises from the act of the tenant in taking possession.

It is for the interest of the lessor and of the lessee, that this instrument should be construed as a demise. It is for the interest of the lessor to have a permanent term. \* \* By holding this to be an agreement only, the right to recover the rent would be postponed.

## (Maule, J.: What interest do you contend passed?)

The interest or right to commence operations, an interest of great importance to the parties. There is another ground for supporting this as a lease. In *Morgan* v. *Bissell*, Sir J. Mansfield, Ch. J. says, "I have known parties long hung up at an enquiry before a

- (1) 12 East, 168 b; 2 Camp. 286.
- (2) 15 East, 244.
- (3) 9 Ad. & El. 644; 1 P. & D. 440.
- (4) 8 Bing. 178; 1 Moo. & Sc. 259.
- (5) 5 T. R. 168.
- (6) Ibid. 165, n.
- (7) 3 Taunt. 65.
- (8) "There is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and tenant at sufferance entereth by a lawful lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise, and after his estate ended continueth in possession, and wrongfully holdeth over": Co. Litt. 57 b. But a rightful tenant at will is said to hold by the permission and sufferance of the lessor, and may, in a certain sense, be called a tenant at sufferance.

It seems questionable whether ejectment can be maintained by a tenant at will, inasmuch as by the demise, which, as between the parties to the consent-rule, must be considered as a real transaction, the will would be

determined. Defendants in ejectment are allowed to set up title in a stranger for the purpose of protecting their possession; and ejectment cannot be maintained on the demise of persons whose title is shown to be founded in wrong,-as tenants at sufferance, or as disseisors, abators, intruders, or other deforciants. But in the absence of proof of the tortious nature of the title of the lessor, the bare fact of possession in the lessor (or in the lessee, if he be a real person, and as such capable of being shown to have been in possession) for however short a period, will be sufficient to support an ejectment, and would indeed have been sufficient to support a writ of right. Vide 10 Edw. IV., (or rather 49 Hen. VI., the case having occurred during the short period of the recaption, as it was called, of regal power by Henry the Sixth) fo. 18, pl. 22; Bro. Abr. tit. Pleadings, pl. 99; Allen v. Rivington, 2 Saund. 111, and note to that case in 6th ed. of Wms. Saund.; 2 Man. & Ry. 112 (a).

Master in Chancery, what are the usual covenants?"(1). So here, it would be attended with great inconvenience to the parties if the right should be suspended until all the questions which might be raised upon the instrument, were finally settled.

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## TINDAL, Ch. J.:

The question in this case is, whether the instrument produced in evidence on the part of the plaintiff, operated as a lease, or was merely an agreement for a lease to be executed; and upon the best consideration I can give, the latter appears to me to be the proper legal construction, and to be that contemplated by the parties. From the case of Doe d. Jackson v. Ashburner (2) downwards, it has been held, that the intention of the parties, as appearing upon the face of the instrument, in connexion with the surrounding circumstances, must govern its construction; but further or wider than that I am not prepared to say that we have any right to go. Now, in order to ascertain the intention, it is important to consider whether possession was given by the instrument, and whether it contains words of present demise.

The words are: "Morgan T. David hereby agrees, for himself, &c. to let and grant a lease to Messrs. George R. Morgan, Edward M. Williams, and Thomas Wayne, the coal, iron-mine, and fire-clay," &c. It \*may be conceded that the words "I agree to let" do not make the instrument an agreement only, provided the rest of the words show an intention to create an actual demise: but they throw a doubt upon the intention, and when we find them coupled with the words "and grant a lease," they rather seem to indicate that an intention to execute a future lease predominated, and at least leave the matter in doubt and uncertainty. the end of the instrument, the parties come back again to the use of words of agreement. The tenants say-"We hereby bind ourselves to commence sinking a pit before the 24th of June next: and the said Morgan T. David engages that he has not incumbered the said estate, to prevent him entering into a lease on the above terms and agreement." Now, it is very important, before a party proceeds to invest property in a mine, to see that the proposed lessor has the power to grant the lease, that he has not incumbered the estate, or so dealt with it as to render the lessee liable to be disturbed by one having title paramount. Again, the lease is to contain "the usual covenants," and such as are "entered into by

[ \*989 ]

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the lessor's brother." Some preliminary proceedings were therefore contemplated; a consultation with some attorney would be necessary to enable the parties to know what were the usual covenants, and some inquiry as to what were the covenants entered into by the lessor's brother. This tends to show the predominant intention of the parties to have been that a future lease should be executed. The clause at the end—"And the said Morgan T. David engages to sign a lease upon the said terms as soon as it can be prepared?" shows plainly that the execution of a more formal lease at some future period was contemplated. According to Poole v. Bentley (1), to constitute a lease, it is necessary \*that it should appear that the parties contemplated the creation of a present interest (2) in the subject-matter. Here, there was no previous possession, and no possession is stipulated for. It is quite uncertain when the actual occupation was to begin, but it seems to have been considered that sufficient opportunity was left for preparing a formal lease, there being no immediate possession. or any agreement for immediate possession: the second test suggested in many of the cases, therefore fails. Another point is that which arose in Morgan v. Bissell, where it is said that strong circumstances of inconvenience appearing on the instrument, if it should be construed as a lease, indicate the intention of the parties that it should operate as an agreement only. Are there here circumstances of inconvenience attending the construction of this instrument as a present demise? When is the rent to commence? It is left quite in ambiguo. No part of the surface is here demised, and no way of getting at the coal is alleged to have been demised. A grant of an easement in alieno solo, being an incorporeal hereditament, can only be by deed: Bird v. Higginson (3). Without an instrument under seal, the tenants would not be entitled to exercise rights absolutely necessary for the enjoyment of the subject-matter of the demise (4).

(1) 2 Camp. 286; 12 East, 168.

(3) 2 Ad. & El. 696; 4 Nev. & M. 505.

but over Blackacre, demises Whiteacre to B. by parol: B. has a way over Blackacre, as incident to the demise, or, as it is called, as a way of necessity. So, by a sale of growing timber, a right of ingress and egress over the land, passes. The vendee of fish in a pond, cannot cut down the banks of the pond,—not because he has no deed, but because the fish may be taken in nets: Fitz. Abr. tit, Barre, pl. 237.

<sup>(2)</sup> I.e., a present interesse termini, in other words a presently vested right to enter and take possession, either immediately or at a future period, as the habendum may be.

<sup>(4)</sup> But things lying in grant may pass as incident to that which lies in livery. A. seised of Whiteacre and Blackacre, with no access to Whiteacre

Don d. Morgan

r. Powell.

[ 991 ]

## COLTMAN, J.:

The question which we have to determine in the present case is, whether it was the intention of the parties that the interest in a term of seventy years in the minerals should pass, by the instrument signed on the 19th of February, or whether its object was not merely to settle certain terms which should form the bases of a future lease. In determining questions of this nature great difficulties often arise; and great difficulty exists in the present case, where we find nothing in express terms to determine what was the predominant intention of the parties. If there had been any proviso for immediate possession, I should have thought it would have gone far to determine the case. If I could see an intention to give possession immediately. I should say that this circumstance added to the other matters, would induce me to hold the instrument to be a lease. But the only stipulation bearing on the possession is, that the lessors of the plaintiff shall commence sinking a pit at some indefinite period before the 14th of June. Another test has been suggested—the convenience of the parties: and my brother Channell contends that it was for the interest of both parties, and particularly for the interest of the landlord that the instrument should enure as a lease. I cannot think that it would be for the interest of the landlord to allow possession to be taken under such an instrument. The rent is not to commence until the expiration of a year from the sinking of the pit through the four-foot coal. When that is to be done, is altogether undefined: there is nothing to compel the lessees to cut through the four-foot coal, and it might be to the interest of the grantees never to do so; and so no rent would become payable at all. It is often worth while to take a lease in order to keep coal out of the market. It is difficult to conceive how any person who contemplated an engagement for seventy years, could enter into so blind a bargain.

MAULE, J.:

[ 992 ]

I also think that the rule should be discharged. The question is, whether the instrument given in evidence amounts to a present demise, or is to be carried into effect by a writing under seal (1); and that question, as was properly admitted by my brother

(1) Under the 7 & 8 Vict. c. 76, all leases of land in writing were to be by deed. That statute was repealed by the 8 & 9 Vict. c. 106, which requires a deed only where a lease is required

by law, to be in writing. Leases of things lying in livery for less than three years, were not required by law to be in writing, and leases of things lying in grant could only be by deed. DOE d. MORGAN v. POWELL.

Channell, is to be determined by the intention of the parties. Looking at the terms of the instrument, and the nature of the property, we have to say whether it was intended by these parties that an interest in land should pass by that instrument. Whatever doubt may exist in other cases, I think we have here abundant materials to remove all doubt. It is admitted that the intention of the parties could not be completely carried into effect without an instrument under seal. The easement of depositing rubbish on the surface in sinking the pit, and of breaking into the soil, and of making a wharf, which forms a very material part of the contract. could not pass by this unsealed instrument, inasmuch as it is a thing that lies in grant. My brother Channell says, that although such easements would not pass because they lie in grant, the parties may have not considered what lie in grant and what did not. I think it very likely that none of these parties knew what does or does not lie in livery. But I think also that the parties supposed that their object could not have been effected without a regular They would therefore come to the same conclusion, as the most skilful conveyancer would have done.

[ \*993 ]

It has been contended by my brother Wilde, that the subsequent conduct of the parties may be looked at to ascertain their intention at the time of contracting; for \*which he cites a dictum of my Lord CHIEF JUSTICE in Doe d. Pierson v. Ries (1). The question there was, whether the instrument had reference to the demise of a house which was out of repair, and which it was necessary that the tenant should take possession of, for the purpose of doing the repairs, for some time before such possession could be beneficial. turned upon the state of the property at the time, and it proves nothing as to the admissibility of collateral acts of the parties for the purpose of ascertaining what had been their intention at the time of contracting. Here, if the parties had at any time afterwards said what estate they took under this instrument, their statements would have been evidence against themselves. The instrument contains a provision for beginning to work before the 24th day of June, 1838. The rent is not to commence before twelve months after a pit is sunk through the four-foot coal. The lease would point out when the lessees were to get through the four-foot coal. and thereby fix the period for the commencement of the rent. entertain not the smallest doubt that the instrument was intended as an agreement for a future lease.

<sup>(1) 8</sup> Bing. 178; 1 Moo. & Sc. 259.

## ERLE, J.:

I also am of opinion that this instrument is an agreement only, and does not amount to a lease. It is to be construed with reference to the apparent intention of the parties and the nature and to the state of the subject-matter. Mineral property requires a most definite statement of the rights of the parties. If this instrument was to operate as a lease, all parties would be material The lessees are not bound to work through the four-foot coal; and therefore no certain rent is reserved: on the other hand, the lessees would have no means of access. In mining property it is \*necessary to have power to deposit rubbish. Under this instrument the lessees would have no right to that easement. appears by no means clear that if a lease had been tendered to the lessor for execution in the form contained in this instrument he would have been bound to execute it. And on the other hand, if there were no title in the lessor, the lessees would not, I think, be bound to accept a lease.

Don d. MORGAN POWELL.

[ \*994 ]

Rule discharged.

## GRINNELL v. WELLS (1).

(7 Man. & G. 1033-1044; S. C. 2 Dowl. & L. 610; 8 Scott, N. R. 741; 14 L. J. C. P. 19; 8 Jur. 1101.)

1844. Nov. 25. f 1033 1

An action for seduction cannot be maintained without loss of service.

Case, for the seduction of the plaintiff's daughter.

The declaration stated that before and at the time of committing the grievances, and from thence until the time of the pregnancy and sickness and of the plaintiff's expending the moneys and incurring the debts, thereinafter mentioned, Alice Grinnell, the daughter of the plaintiff, was a poor person who maintained herself by her labour and personal services, and, except by her labour and personal services, was not of sufficient ability to maintain herself, and was, during all that time, unmarried, and an infant under the age of twenty-one years, to wit, of the age of fourteen years, and at and during and after the time of her pregnancy and sickness, as thereinafter mentioned, and of the plaintiff's expending the moneys, and incurring the debts, thereinafter mentioned, the said Alice was such poor person, infant, and unmarried, and was not of sufficient ability to maintain herself: yet the defendant, well knowing the

(Foll. Eager v. Grimwood (1847) 1 615, 36 L. J. C. P. 306. Whitbourne v. Williams [1901] 2 K. B. 722, 70 Ex. 61, 63; 16 L. J. Ex. 236, and see Evans v. Walton (1867) L. R. 2 C. P. L. J. K. B. 933.—C. A.

GRINNELL C. WELLS.

[ \*1034 ]

premises, but contriving to injure the plaintiff, and to compel him to maintain the said Alice, on the 27th of May, 1841, and on divers other days, &c., debauched and carnally knew the said Alice, whereby she became pregnant and sick with child, and so continued for a long time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, &c. the said Alice was delivered of the child with which she was so pregnant as aforesaid; by means of which premises the said Alice, for a long time, to wit, &c. became and was unable to work or to maintain herself, which she might, and otherwise would, have done; and the plaintiff, so being her father, and being of sufficient ability to maintain \*the said Alice, was, by means of the premises, during all that time, forced and obliged to, and necessarily did, maintain the said Alice at his own charges; and also by means of the premises, the plaintiff was obliged to, and did necessarily, pay, lay out, and expend divers moneys, and incur divers debts, in the whole amounting to 50%, in and about maintaining, nursing, taking care of, and curing the said Alice, and in and about her delivery, during the time she was so unable to maintain herself as aforesaid. Wherefore the plaintiff saith that he is injured and hath damage to the value of 500l., &c.

Plea, Not guilty; whereupon issue was joined.

The cause was first tried before Erskine, J., at the Spring Assizes at Gloucester in 1843, when a verdict was found for the plaintiff, damages 300l. In the following Term a rule nisi was obtained for a new trial on the ground of excessive damages, the declaration only pointing to expenses actually incurred by the plaintiff in his daughter's maintenance and cure, and upon affidavits impugning the character of the principal witness; and also to arrest the judgment. In Trinity Term the rule was made absolute for a new trial on payment of costs, the defendant agreeing that any damages to be assessed on the second trial, might be estimated agreeably to the principles applicable to ordinary actions for seduction. At the second trial, which took place before Williams, J., at the Gloucester Summer Assizes, 1843, the jury again found a verdict for the plaintiff, damages 200l.

Talfourd, Serjt. (with whom was Greaves), in Michaelmas Term 1848, moved in arrest of judgment:

The declaration discloses no legal ground of action. This is not an action brought in the ordinary form for seduction; but for an act of incontinence committed by third persons, from which act damage is alleged to have \*arisen to the plaintiff. In Satterthwaite v. Dewhurst (1), the Court, upon a motion to arrest the judgment, held that the action would not lie unless it were laid with a per quod servitium amisit. The relation of master and servant has always been held a necessary ingredient in such an action. Formerly, parties declared in trespass, per quod servitium amisit; and a count for debauching the plaintiff's daughter might be joined with a count for breaking and entering the plaintiff's house: Woodward v. Walton (2). Now, however, it is, perhaps more properly, considered as an action upon the case; but it is agreed that the mere relation of parent and child without some service, does not give the father a remedy against the seducer of his daughter: Russell v. Corne (3), Postlethwaite v. Parkes (4), Bennett v. Allcott (5), Dean v. Peel (6). In two recent cases in the Exchequer, attempts appear to have been made to relax that principle: Harris v. Butler (7), Blaymire v. Haleu (8). In the latter case PARKE, B. referred to Maunder v. Venn (9) as an authority that there must be proof of service, actual or constructive. Hall v. Hollander (10) was an action of trespass for driving a carriage against the plaintiff's son and servant, whereby the plaintiff was deprived of his services, and was put to expense about his cure: it was held that the loss of service was the gist of the action, and that the child (who was only two years and a half old) being incapable of performing any service, the action was not The common law imputes no obligation on a parent maintainable. to support \*his child: Mortimore v. Wright (11). The 48 Eliz. c. 2, s. 7, provides "that the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person, in that manner and according to that rate as by the justices of peace of &c. shall be assessed, upon pain that every one of them shall forfeit 20s. for every month which they fail therein" (12). But all the circumstances which constitute the breach of duty, must appear upon the record: Gray

GRINNELL v. WELLS. [\*1035]

[ \*1036 ]

<sup>(1) 4</sup> Doug. 315, shortly reported per nomen Saterthwaite v. Duerst, 7 B. R. 654, n. (5 East, 47, n.).

<sup>(2) 2</sup> Scott, N. R. 476.

<sup>(3) 2</sup> Ld. Ray. 1031; 6 Mod. 127.

<sup>(4) 3</sup> Burr. 1878.

<sup>(5) 2</sup> T. R. 166. See 31 R. R. 667, n.

<sup>(6) 7</sup> R. R. 653 (5 East, 45).

<sup>(7) 46</sup> R. R. 695 (2 M. & W. 539).

<sup>(8) 55</sup> R. R. 501 (6 M. & W. 55).

<sup>(9) 31</sup> R. R. 734 (Moo. & Mal. 323).

<sup>(10) 28</sup> R. R. 437 (4 B. & C. 660; 7

Dowl. & Ry. 133).

<sup>(11) 55</sup> R. R. 704 (6 M. & W. 482).

<sup>(12)</sup> And see 4 & 5 Will. IV. c. 76, s. 56.

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[ \*1037 ]

v. Jefferies (1), Barham v. Dennis (2), Robert Mary's case (3). Rex v. Cornish (4), and Daris v. Black (5), were also referred to.

A rule nisi having been granted,

Sir T. Wilde, Serjt. (with whom were Channell, Serjt. and Godson), in Easter Term last, showed cause:

Since the new rules, the plea of Not guilty in this action only

puts in issue the fact of the debauching: the other averments in the declaration not traversed, must be considered as admitted in the sense in which they will maintain the action: Spieres v. Parker (6). The father, if of ability, is, by the statute 43 Eliz. c. 2, s. 7, bound to maintain his poor child. It would seem to mark a very defective state of society, that a legislative provision should be required for the purpose of enforcing an obligation so sacred: but the statute of Elizabeth is not directed so much to the relation of parent and child, as to relieve third persons from the obligation of providing \*for a party whose relations were of ability to support him. The parent might leave the burthen of supporting his child to the parish, if he knew that the child must be provided for, with or without any exertion on his part. If a moral obligation is capable of being enforced by legal means, the party is not bound to wait until he is actually coerced: Blyth v. Smith (7). It is not necessary that costs should have been actually incurred in order to have a remedy If any doubt exists as to the necessity of showing actual coercion, the Court may be relieved from considering that point in the present case, because upon this record, supposing it to be necessary, it must be presumed that an order of maintenance was made by the justices. If the words "forced and obliged to pay" will give a cause of action, what is the meaning of the words used here?

(TINDAL, Ch. J.: There is here a distinct allegation, it is not matter coming in merely by a per quod.)

That allegation is therefore traversable. It is not like an allegation of special damage in trespass. The party is forced and obliged when under moral obligation and legal liability. In an action for

<sup>(1)</sup> Cro. Eliz. 55.

<sup>(2)</sup> Cro. Eliz. 769.

<sup>(3) 9</sup> Co. Rep. 113 a.

<sup>(4) 36</sup> R. R. 639 (2 B. & Ad. 498).

<sup>(5) 1</sup> G. & D. 432.

<sup>(6) 1</sup> R. R. 165 (1 T. R. 141). And see Hobson v. Middleton, 6 B. & C. 295;

<sup>9</sup> Dowl. & Ry. 249; and 1 C. B. 787.

<sup>(7) 63</sup> R. R. 331 (6 Scott, N. R. 360;

<sup>5</sup> Man. & G. 405).

running down a ship or a carriage, the declaration alleges that the plaintiff, by reason of the premises, was forced and obliged to lay out money in repairs. It cannot be doubted that the plaintiff might have been compelled to support this daughter. The record discloses every fact necessary to entitle the justices to make an order. In Hall v. Hollander (1), power in the father to command the services of the child, and capacity in the child to perform the services when required, were held to be sufficient. Looking at this case as arising not on demurrer, but after verdict, the plaintiff is in the same position as if an allegation of the order had been expressly traversed, and the issue \*upon that traverse had been found for the plaintiff. What must the plaintiff have proved upon the traverse of that allegation? The Court must intend all that the plaintiff would have been obliged to prove upon the traverse of the allegation. If the Court would have said, you must go on to prove the order upon the trial of an issue upon the traverse, it must be now taken that such an order existed. The defendant must be taken to admit every fact which he does not traverse, in the same sense in which it must have been proved if traversed.

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[ \*1038 ]

(TINDAL, Ch. J.: You say that if the statement in Hall v. Hollander, had been as in the present declaration, the plaintiff might have recovered.)

Yes; in that case BAYLEY, J. says, "In this case it was proved that the plaintiff did not necessarily incur any expense. If he had done so, I am not prepared to say that he could not have recovered upon a declaration, describing as the cause of action, the obligation of the father to incur that expense." In Hall v. Hollander there are two or three things to be observed. The case was put on the ground of service, and no acts of service were proved. Secondly, the child was placed in an hospital, and no expense was necessarily incurred by the father. Holkoyd, J. points out some difficulties. Satterthwaite v. Dewhurst is a loose report, in which the cases cited have no connection with the subject. Russell v. Corne although contended to be in point, only shows that an action will not lie simply for seduction. In the case of Satterthwaite v. Dewhurst there is, in the judgment of the Court, an absence of all reference to the point now in dispute. The main question was, whether case would lie. It is there said that the action is brought for incontinence. is not so.

<sup>(1) 28</sup> R. R. 437 (4 B. & C. 660; 7 Dowl. & Ry. 133).

GRINNELL r. Wells (COLTMAN, J.: Lord MANSFIELD must mean that an action will not lie unless there be damnum et injuria.)

[ \*1039 ]

He could not mean to say that actual pecuniary loss would not give a right \*of action. Every word of the judgment must apply to a case of loss actually incurred, if it is applicable at all to the present case: Spieres v. Parker (1), Dalby v. Hirst (2).

Channell, Serjt., on the same side:

The justices may make an order upon the parent for relief. If this plaintiff had been summoned, he could have made no defence. In Rippon v. Norton (3) it was contended that the plaintiff had a cause of action for the expense of curing his son who had been beaten; and it was held to be no cause of action, because it was that which he was not compellable to pay. This case stands clear of the statutes relating to illegitimate children. If the facts alleged in the declaration are such as to bring the plaintiff within the statutes, it is the same thing as if an order of justices were made and not executed. There is nothing here to exclude evidence of such an order. It must be admitted that Satterthwaite v. Dewhurst as reported in 4 Doug., which report was not published till 1831, creates some difficulty.

(COLTMAN, J.: Your argument would apply as well to the case of a daughter of the age of forty-five, as to one of fifteen.)

It is clear, that the plaintiff was bound to maintain his daughter: Hunt v. Wotton (4). In an action on the case for a nuisance, in stopping up a way, it is not necessary to show that actual damage has been sustained.

Talfourd, Serjt., in support of the rule:

This declaration discloses no cause of action. If the action can be sustained on the ground suggested, it is surprising that it should be now brought for the first time. The plaintiff assumes that the act charged is wrongful as against him. That, however, is a fallacy, considering the \*numerous cases in which it would have been available. It is an act punishable in the Ecclesiastical Courts. It is an immoral act, but not an act wrongful in the sense necess to found an action at law for the consequences. In all of

[ \*1040 ]

<sup>(1) 1</sup> R. R. 165 (1 T. R. 141).

<sup>(2) 21</sup> R. R. 577 (1 Brod. & B. 224).

<sup>(3)</sup> Cro

<sup>(4)</sup> T

the ground of the action has been considered to be the violation of the relation of master and servant: Postlethwaite v. Parkes (1), Dean v. Peel (2), Speight v. Oliviera (8), Harris v. Butts (4), Blaymire v. Haley (5). In Hunt v. Wotton there was an actual trespass. Court of Exchequer have in the most emphatic manner decided this point in Mortimore v. Wright (6). With regard to the statute of Elizabeth, it is not consistent with the declaration that an order of justices should have been made. The allegation is, that the plaintiff was, by reason of the premises—that is, by means of the pregnancy and sickness, and not by means of an order of justicesforced and obliged to maintain his daughter. This declaration is defective; first, because it shows no relation of master and servant; secondly, because supposing the relation to exist, there is no legal damage, inasmuch as the act complained of must be taken to be the voluntary act of the servant.

GRINNELL WELLY,

Cur. adv. vult.

TINDAL, Ch. J., now delivered the judgment of the COURT:

The question in this case arises upon a motion in arrest of judgment, and is this-whether a father can maintain an action upon the case for the seduction of his daughter, where he is unable to allege in the declaration, the loss of her service by reason of the defendant's wrongful act.

The declaration in this case contains no allegation of the loss of the service of the daughter, but instead \*thereof, alleges that the daughter was a poor person, maintaining herself by her labour and personal services, and not of sufficient ability to maintain herself otherwise; and, after stating that the defendant debauched her, and that she was delivered of a child, and her thereby becoming unable to work or maintain herself, alleges, as the gravamen of the plaintiff, that he, being her father, and being of sufficient ability to maintain his said daughter, was, by means of the premises, forced and obliged to, and necessarily did, maintain his said daughter, at his own charges, and did necessarily pay large divers money, and incur divers debts in and about the maintaining and nursing &c. of his said daughter, during the time she was unable to maintain herself. And the question arises—whether the want of the allegation of the loss of service, is supplied by the substitution of the beforerecited allegation.

[ \*1041 ]

- (1) 3 Burr. 1878.
- (2) 7 R. R. 653 (5 East, 45).
- (3) 20 R. R. 728 (2 Stark. N. P. 493).
- (4) 46 R. R. 695 (2 M. & W. 539).
- (5) 55 R. R. 501 (6 M. & W. 55).
- (6) 55 R. R. 704 (6 M. & W. 482).

GRINNELL v. Wells.

「\*1042 T

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. Such is the language of Lord Holt in Russell v. Corne, and such the opinion of the Court in the earlier case of Gray v. Jefferies, with reference to an action by a father for a personal injury to a child, which stands precisely on the same footing. See also Randle v. Deane (1). It has, therefore, always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail: see Bennett v. Alcott. It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the \*invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. distinction is most clearly and pointedly put by the Court in Robert Mary's case, where it is said, "If my servant be beaten, the master shall not have an action for this beating, unless the battery is so great that by reason thereof he loses the service of his servant: but the servant himself for every small battery shall have an action: and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a per quod, viz. per quod servitium amisit; so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of the service, is the cause of his action."

No precedent in an action for seduction has been brought before us (except those in Harris v. Butler and Blaymire v. Haley, in both of which cases the declarations were held bad), in which there has not been an allegation of the loss of service to the father: and the struggle has always been at the trial, to give some proof either of actual service or of the implied relation of master and servant. And in the case of Dean v. Peel, where the loss of service was alleged in the declaration, but where the proof at the trial was only this, that the daughter was in the service of another person at the time of the seduction without any intention of returning to her father's house; but that, upon her seduction, she came home and was maintained by her father during her illness, the action was notwithstanding held not to be maintainable. Now, that case is,

(1) 2 Lutw. 1497.

in evidence, precisely what the present case is in pleading upon the record; and therefore it affords a direct authority for the position, that, where there is the absence of any allegation of the loss of service to the father, although there may be an allegation of his being compelled to pay the expenses arising from the wrongful act, the \*action is nevertheless not maintainable. Upon the ground of action, therefore, set forth upon this record, we do not feel ourselves warranted in giving judgment for the plaintiff; as we think the declaration discloses no legal wrong to the plaintiff, no invasion or violation of his legal rights.

Grinnell t. Wells.

[ \*1043 ]

Many observations suggest themselves against the soundness of the argument upon which the plaintiff relies.

In the first place, if the liability to support the daughter under the statute of Elizabeth, would form a ground of action per se, independently of any service, it would seem scarcely credible, as that statute was passed long before any of the cases above referred to, that the difficulty of proof of service, either actual or implied, which has occurred in so many cases, should not have been avoided and answered by framing the declaration, like the present, upon the legal liability of the father to maintain his daughter under the statute.

In the next place, if this ground of action is available in the case of seduction of a daughter, it is equally so in the case of every beating of a son, whether his service be lost or not: and, upon this supposition, the beating of a son, at whatever advanced age, and although altogether emancipated from his father's family, would form a ground of action at the suit of the father, if called upon, under the statute, to maintain his son.

And, still further, this anomaly would follow, that, as the father is only liable, under the statute, to maintain his daughter where he is of sufficient ability so to do, and as the damages recoverable by the father, when he brings the action, are, confessedly, not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case, the right of action to recover compensation would be confined to persons of ability to maintain the \*daughter, and would be denied to the poorer orders of the community—a result that would be most unreasonable (1).

[ \*1044 ]

(1) It may be observed, however, that the quasi fiction of servitium amisit affords protection to the rich man, whose daughter occasionally

makes his tea, but leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers.

Grinnell v. Wells, We therefore think, for the reasons above given, the cause of action as stated on this record, is insufficient, and that the rule for arresting the judgment must be made absolute.

Rule absolute.

1844. May 8.

[ 147 ]

# JAMES CLARK v. HENRY ALEXANDER (1).

(8 Scott, N. R. 147-165; S. C. 13 L. J. C. P. 133; 8 Jur. 496.)

In order to take the case out of the Statute of Limitations, the plaintiff produced in evidence annual statements of account which had been transmitted to him from the defendant's house at Calcutta from the year 1816 to the year 1832, both inclusive. These accounts were made up to the 30th of April in each year, and bore the signature of the firm, "A. & Co.," at the foot thereof. The credit side of the last account, which was dated within six years of the commencement of the action, contained three items—the first, dated May 1, 1831, "By balance of last account,"—the second, of the same date, gave credit for the omission of a sum in the account of a former year—the third, dated April 30, 1832, was "Balance of interest account." The debit side consisted of various items of payments made by A. & C. between the 2nd of May, 1831, and the 2nd of April, 1832; after which followed two items dated April 30, 1832, and the balance was then brought down, for which the action was brought.

The signature of "A. & Co." at the foot of the account was not proved to be the handwriting of the defendant, nor that of any member of the firm: Held, that this was not a sufficient signature by the party chargeable to bring the case within the exception of the 9 Geo. IV. c. 14, s. 1.

Quære, whether it would have sufficed to charge the defendant if it had been proved to have been the signature of a partner:

Held also, that the account did not disclose any payment within the meaning of the Act.

Held also, that the account, being insufficient to form a ground of action as an acknowledgment in writing signed by the party chargeable, was equally insufficient as an account stated between the parties.

This was an action of assumpsit. The writ of summons issued on the 26th of April, 1838. The declaration alleged that the defendant was indebted to the plaintiff in 30,000*l*. for money lent, and in 30,000*l*. for money had and received, and in 10,000*l*. for interest, and in 30,000*l*. for money found due upon an account stated.

The defendant pleaded: first, non assumpsit.

(1) Cited in Swift v. Winterbotham (1873) L. R. 8 Q. B. 244, 249; 42 L. J. Q. B. 111 (S. C. sub. nom. Swift v. Jewsbury (1874) L. R. 9 Q. B. 301; 43 L. J. Q. B. 56) as an authority upon s. 6 of Lord Tenterden's Act. As to

sufficiency of signature by an agent for the purposes of the first section, upon which this case was decided, see now the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13.

—J. G. P.

Secondly, payment before action brought of 10,000l. in full satisfaction and discharge of all the damages by the plaintiff ALEXANDER. sustained on occasion of the non-performance of the promises in the declaration mentioned, and that the plaintiff then accepted and received the said sum in full satisfaction and discharge of such damages.

CLARK

Thirdly, a set-off of 10,000l. for money lent, money paid, interest, and money due on an account stated.

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Fourthly, that the said several causes of action in the declaration mentioned did not nor did either of them accrue to the plaintiff at any time within six years next before the commencement of this suit, in manner and form as the plaintiff had above thereof complained against him. Verification.

Fifthly, that the defendant theretofore, to wit, prior to the month of May, 1816, carried on business as a partner in a certain co-partnership under the firm and style of Alexander & Co., and that the said debt in the declaration mentioned was due and owing from the said firm of Alexander & Co. to the plaintiff; that theretofore, to wit, on the 1st of May, 1816, he the defendant retired from the said co-partnership, and one A. J. Macan then became a partner in the said firm, and the said business was continued to be carried on under the firm and style aforesaid, whereof the plaintiff then had notice; that thereupon afterwards, in consideration that the said A. J. Macan would, with the assent and knowledge of the plaintiff, and as one of the said firm, become liable to and responsible for the said debt so due and owing as aforesaid to the plaintiff, he the plaintiff agreed with the said firm and the defendant to discharge and did discharge the defendant from all liability in respect thereof; and that the said A. J. Macan did become as aforesaid liable to and responsible for the said debt so due and owing as aforesaid, whereby the defendant became and was discharged as aforesaid. Verification.

Sixthly, a similar plea to the fifth, alleging the defendant's retirement from the co-partnership on the 1st of November, 1818, and that James Young and Thomas Bracken then became members thereof, and responsible for the debt.

Seventhly, a similar plea alleging that the defendant retired from the co-partnership on the 1st of May, 1820, \*and that J. C. C. Sutherland and G. Ballard then became members thereof.

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Eighthly, a similar plea alleging that the defendant retired from the co-partnership on the 1st of May, 1822, and that one Nathaniel Alexander then became a member thereof.

CLARK v. Alexander. The plaintiff joined issue on the first plea, and traversed the others, replying to the fifth, sixth, seventh, and eighth respectively, that he the plaintiff did not agree with the said supposed firm and the defendant to discharge nor did he discharge the defendant from liability in respect of the said debt, in manner and form &c.

The particulars of the plaintiff's demand commenced with a balance of 83,240 sicca rupees, appearing to have been due to the plaintiff on the 30th of April, 1831, and concluded with a balance alleged to be due on the 30th of April, 1832, of 83,547 sicca rupees, 14 annas.

The cause was tried before Coltman, J., at the adjourned sittings in London after Trinity Term last. It appeared that the plaintiff, prior to the year 1816, was resident in India, and had an account with the Bank of Alexander & Co. at Calcutta. After his return to this country he received annual accounts bearing what purported to be the signature of the firm, the first being dated the 30th of April, 1816, showing a balance due to him of 93,125 sicca rupees, and the last being dated the 30th of April, 1832, and exhibiting a balance in the plaintiff's favour of 83,547 sicca rupees, 14 annas, for the recovery of which the present action was brought.

This last account had on the credit side three items only: the first, dated the 1st of May, 1831, was, "By balance of last account, 83,246 sicca rupees"; the second, of the same date, gave the plaintiff credit for the omission of a sum in the account of a former year; and the third, dated the 30th of April, 1832, was "Balance of interest account, calculated at 8 per cent." The debit side of the account showed various payments made by Alexander & Co. \*for the plaintiff between the 2nd of May, 1831, and the 2nd of April, 1832, both inclusive; and subsequently to this latter date were two items only, both dated the 30th of April, 1832, the one "Postage and petty charges, 2 sicca rupees," the other "Commission on the disbursement of a certain sum, 60 sicca rupees." The balance was then brought down, and the account was signed at the foot thereof: "Calcutta, 30th April, 1832, errors excepted, Alexander & Co."

It was admitted that the defendant was a partner in the firm of Alexander & Co. in the year 1816; and there was no legal evidence of the partnership having been dissolved, or of any notice to the plaintiff of the defendant's retirement from the firm.

There was no evidence to show whose handwriting was the

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signature "Alexander & Co.;" all that appeared was, that it was the same handwriting as the signature to similar annual accounts ALEXANDER. that had been rendered by the firm to another of their customers, who was called as a witness.

CLARK

On the part of the plaintiff it was submitted, that, the defendant having been shown to have been a partner in the house of Alexander & Co. in the year 1816, the legal presumption would be that he still remained a partner, until proof given to the contrary; and therefore that the plaintiff had a right to assume that he was a partner when the last account was rendered, in 1832; and that the case was not within the Statute of Limitations.

For the defendant it was insisted, that the plaintiff's claim was barred by the statute; that the account rendered in April, 1832. was not sufficient to take the case out of the statute; and that there was no item or admission therein to satisfy the 9 Geo. IV. c. 14.

The learned Judge, being of opinion that the plaintiff's claim was barred by the statute, directed the jury to find for the defendant upon the fourth issue, and as to the other issues they were discharged by consent.

Channell, Serjt., in Michaelmas Term last, obtained a rule nisi to set aside this verdict, and for a new trial, relying principally on the case of Ashby v. James (1).

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Wilde and Bompas, Serjts. (R. V. Richards and J. Pitt Taylor were with them), in Hilary Term last, showed cause:

There was no evidence to show that the signature to the account of the 80th of April, 1882, upon which it is sought to charge the defendant, was the signature of the defendant; nor that it was the signature of any member of the firm. It may have been the handwriting of some one of the persons who at various times joined the concern; or it may have been that of a clerk or agent, and the signature of an agent is clearly not sufficient to bring a case within the exception of the 1st section of the statute 9 Geo. IV. c. 14: Hyde v. Johnson (2). The ruling of the learned Judge in this case was correct on principle as well as upon authority.

Channell, Serjt. (Hoggins was with him), in support of the rule: There being no proof that the present defendant ever ceased to be

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(2) 42 R. R. 737 (3 Scott, 289; (1) 63 R. R. 676 (11 M. & W. 542). 2 Bing. N. C. 776.

Clark v. Alexander. a partner in the house of Alexander & Co., the presumption of law is that he continued to be a partner at the time the last account was rendered. With respect to the signature, it was not disputed at the trial that it was the handwriting of a member of the firm. [They cited Ashby v. James (1).]

Cur. adv. vult.

[ 161 ] TINDAL, Ch. J., now delivered the judgment of the Court:

This was an action of indebitatus assumpsit for money lent, money paid, money had and received, and upon an account stated; to which the defendant pleaded, amongst other pleas, non assumpsit, and the Statute of Limitations: and, upon the trial before my brother Coltman, at Guildhall, at the adjourned sittings of the last Trinity Term, a verdict was found for the defendant on the issue joined upon the plea of the Statute of Limitations, upon the ground that the action was barred by the statute; and the case is now brought before us upon a motion to set aside that verdict, and for a new trial.

The writ of summons upon which the action was brought was sued out on the 26th of April, 1888, and consequently the action is barred by the statute, unless the cause of action or some part of it arose since the 20th of April, 1832, or unless the case falls within some of the exceptions in the statute.

The plaintiff had been a constituent or customer of the house of Alexander & Co., bankers, at Calcutta, for many years, of which house the defendant, as it was admitted at the trial, was a partner in the year 1816; and, as there was no evidence of such partnership having been dissolved, or of any notice to the plaintiff of the retirement of the defendant from the firm, the defendant must be considered as subject to all the legal consequences of being a partner at the time of the commencement of this action.

The plaintiff, in support of his case, produced in evidence annual statements, from the year 1816 to the year 1832, both inclusive. These accounts were rendered to him by the Bank in each successive year: they were made up to the 30th of April in each year, on which day the balance was struck; and they bore the signature "Alexander & Co.," being the firm of the house at Calcutta, at the foot of each such account.

The last of these annual accounts, upon which the question mainly turned whether the case was taken out of the Statute of

(1) 63 R. R. 676 (11 M. & W. 542).

Limitations, was signed at the foot thereof—"Calcutta, 30th April, 1832, errors excepted. Alexander & Co." The credit side Alexander. contained three items only; of which the first, under date of May 1st, 1831, was, "By balance of last account, 83,246 sicca rupees "-the second item, under the same date, gave credit for the omission of a sum in the account of a former year—and the third item, under date of the 90th of April, 1892, was, "Balance of interest account, calculated at 8 per cent." The debit side of the account consisted of various items of payments made by the bankers between the 2nd of May, 1831, and the 2nd of April, 1832, both inclusive, after which there followed two, and only two, items, under the date of 30th April, 1832; the one being "Postage and petty charges, 2 sicca rupees," and the other being "Commission on the disbursement of a certain sum. 60 sicca rupees:" and the balance of the two sides of the account is then brought down, viz. 83,547 sicca rupees, 14 annas, for which the present action is brought.

On the part of the plaintiff it is contended that his case is out of the statute, and that he is entitled to recover the balance claimed. on three distinct considerations: first, that the account rendered on the 30th of April, 1832, is "an acknowledgment in writing signed by the party chargeable thereby," within the meaning of the statute 9 Geo. IV. c. 14, s. 1; secondly, that there is evidence of payment of part of the principal and interest admitted to be \*due within six years next before the commencement of the suit; thirdly, that there is evidence of an account stated between the parties within the six years, which is contended to be a new transaction, and to give a new right of suit upon an account stated, quite independent and distinct from the original debt, and which never was within the statute at all.

As to the first point contended for on the part of the plaintiff, we think the assumption he makes is not supported by the evidence in The signature of Alexander & Co. at the foot of the account of the 30th of April, 1832, is not proved to be the handwriting of the defendant, nor the handwriting of any of the partners in the firm. All that is proved amounts to this, that the signature is in the same handwriting as the signature which had been found at the foot of similar annual accounts received by the witness. another customer of the Bank. It is left completely in uncertainty whether it was the handwriting of a clerk in the house, or of a partner: and, although such signature, whether by a clerk or a partner, might be fully sufficient to bind the firm in any ordinary

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CLARK

case between them and a customer, not arising under this statute, ALEXANDER. yet the signature of the clerk would not be sufficient, as was decided by this Court in Hyde v. Johnson (1), to bring the case within the exception of the 1st section of the statute. Even if the signature had been proved to be that of one of the partners, it would have raised the question whether a written acknowledgment made and signed by one of several partners stands upon a different footing from a written acknowledgment made and signed by one of several joint-contractors, which is provided for by the Act—a question upon which we offer no opinion whatever, as it is not before us.

[ \*164 ]

The plaintiff contends, in the second place, that there was proof at the trial of payment of part of the principal \*and interest within six years next preceding the suit, and that the case is thereby expressly excepted from the statute. But to this it appears to us there are two answers. There was no proof of actual payment, by any eye-witness of the fact, or by the production of any documents which of themselves imported payment. The only evidence offered is, the account above referred to. This would at most amount to an admission of payment. But it has been decided that no admission of payment by the party is sufficient to take the case out of the statute, unless it be in writing and signed by the party chargeable: Bayley v. Ashton (2); Jones v. Ryder (3). The case, therefore, is only brought back again to the force and effect of the account itself, upon which we have already given our opinion. But there is a second answer to this argument, namely, that the account itself does not contain any admission of a payment of part of the principal within six years. The earlier items in the account of 1832 may, indeed, be considered as importing payments, properly so called: but the only two items within the last six years are items not importing payments, but charges against the customer. No one can contend that a charge for postage or petty expenses, or a charge for commission, is a payment within the meaning of the Act.

The third ground relied upon by the plaintiff is, that the cause of action was an account stated between the parties, and a balance struck in favour of the plaintiff, within six years next before the commencement of the suit, and that this was altogether a new cause of action, independent of and without any relation to the original demands on either side of the account, and was not in any manner affected by the statute.

<sup>(1) 42</sup> R. R. 737 (3 Scott, 289; 2

<sup>(2) 12</sup> Ad. & El. 423; 4 P. & D. 204.

Bing. N. C. 776).

<sup>(3) 51</sup> R. R. 452 (4 M. & W. 32).

What may be the effect with reference to the statute 9 Geo. IV. c. 14, if two persons, having cross-demands against each other ALEXANDER. barred by the Statute of Limitations, should agree upon the several items on each side, state the account, and ascertain and strike a balance in favour of one of them, it \*is unnecessary to determine; for, there is no such evidence in this case. All that is shown upon this view of the case, is, the same account which has been so often referred to: and, if that account is not sufficient, directly and per se, to form a ground of action, as an acknowledgment in writing signed by the party chargeable, to allow it to have the indirect effect, without any additional evidence, of an account stated between the parties, would be an evasion of the direct enactment of the statute. In the case of Ashby v. James (1), upon which the plaintiff relies as his principal authority, one part of the demand only was barred by the statute, and distinct evidence was given of the several facts necessary to constitute the settlement of mutual accounts, and the striking of the balance between the parties; though, after all, that case may perhaps be better supported on the ground suggested by Alderson, B., "that the going through the account with items on both sides, and striking a balance, converts the set-off into payments." And, again, "The striking of the balance between the parties is evidence of an agreement that the items of the defendant's account shall be set off against the earlier items of the plaintiff's, leaving the case unaffected either by the Statute of Limitations or the set-off." But, in the present case, the document when produced shows that the whole of the plaintiff's demand accrued more than six years before the commencement of the suit; and there is no extrinsic evidence whatever of an actual settlement of account. We therefore think the third ground of argument on the part of the plaintiff cannot be maintained.

It is scarcely necessary to say, that, if the plaintiff is barred from recovering the principal, he must be equally barred from recovering the interest, which is an accessory only, and must follow the nature of the principal. We therefore are of opinion that the rule for setting aside the verdict must be discharged.

Rule discharged.

(1) 63 R. R. 676 (11 M. & W. 542).

CLARK

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## CASES AT NISI PRIUS.

1841. Dec. 15.

#### BRUNE v. THOMPSON.

(Car. & M. 34-43.)

Sittings in London.

in assumpsit for tolls, a computus of a prepositus or reeve of 33 Hen. VI., which was brought from the muniment room of the lord of the [ 34 ] manor, but which was not signed, and of which no evidence of the handwriting could be given, but in which the receiver purported to charge

receivable.

The plaintiff claimed tolls throughout the port of Padstow: Held, that a record of K. B., of 7 Ric. II. of a cause removed by certiorari from the Maritime Court of Aldestowe, was receivable in evidence for the plaintiff, although that cause was an action of trespass for taking a ship, and the present plaintiff and defendant did not claim under either of the parties to it; and evidence was allowed to be given by the witness who produced it, that he had ascertained from records that Aldestowe and Padstow are different names for the same place.

himself with the receipt of money, was offered in evidence: Held, to be

But the opposite counsel will not be allowed to ask him whether he had not found other records besides those given in evidence, which related to the right of the prior of B., from whom the plaintiff traced his title, as that would be giving parol evidence of the contents of those records.

Assumpsit for the tolls of goods passing through a certain manor of the plaintiff, and wharfage in the manor, and for tolls due to the plaintiff as owner of the port of Padstow, with a count for tolls generally.

Plea: as to 10l., being the tolls due for passage and wharfage, and on the last count for tolls generally, a plea of payment of 10l. into Court, and, as to residue, non assumpsit.

Replication: as to the 10l., accepting that sum, with a similiter to the non assumpsit.

The real question in the case was, whether the plaintiff, who was the lord of the manor of Padstow, in the county of Cornwall, was entitled to tolls on all goods shipped from the port of Padstow, or imported into that port; or whether his right to toll extended only to the manor of Padstow, the port extending beyond the manor, and the sum paid into Court being the amount due from the defendant to the plaintiff for tolls within the manor only.

The venue in this case had been originally laid in London; but, on the defendant's application to change it into Cornwall, the plaintiff had retained the venue in London upon the usual undertaking to give material evidence in London.

On the part of the plaintiff the enrolment of an inspeximus charter of 3rd Edward the Fourth, produced by Mr. Devon from the

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Record Office of the Tower of London, was put in. This was an inspeximus and confirmation of several charters granted by Kings John and Edward the First, and by Richard, Earl of Poictier and Cornwall, to the prior and canons of Bodmin, with whom the plaintiff commenced his title to the port of Padstow, the plaintiff deducing his title through the grantee of King Henry the Eighth, after the dissolution of the religious houses.

RRUNE THOMPSON.

It was proposed on the part of the plaintiff to put in a computus of the prepositus or reeve of Padstow, of the 33rd year of the reign of King Henry the Sixth. This computus was brought from the muniment room of the plaintiff by Mr. Coode, one of the attornies for the plaintiff. It was in Latin, and not signed: the following is a translation of it:

"Padstow-The account of Thomas Robyn, reeve there from the feast of St. Michael the Archangel, in the 33rd year of the reign of King Henry the Sixth, unto the same feast next following, in the 34th year, for one whole year.

#### "Rents of Assize.

[ 37 ]

"The same answers for 20s. for the rent of Corgellow, and 71d. for rent at Trenoyow, for a tenement at Padstow, newly built upon the Strond.

# "Culage of the sea.

"And for eight shillings received for culage of the sea there this year. Sum, 8s.

## "Tithe of mills.

"And for eight shillings for the tithes of eight mills there this year, and for (1) —— received for the customs of the sea there this year. Sum, 8s.

# "Decayed rents.

"Several allowed for tenements at Porth Cronck.

# "Money paid.

"And allowed to the same 7s. paid to the aforesaid receiver, by the hands of Thomas Courteys, for culage of the sea, and for a fee of bushelage there this year; and allowed to the same 12d. for default of culage of the sea beyond what was above levied this year; and he oweth 31s. 31d."

## Erle, for the defendant:

I submit that this computus ought not to be received in evidence,

(1) The sum was not legible in the original.

BRUNE v. Thompson. it is not signed by the reeve, and there is no proof that it is in his handwriting.

#### LORD DENMAN, Ch. J.:

I never saw a signature to any of these ancient reeves' accounts, except the name in the heading of the account is so to be considered.

Mr. Devon, in answer to a question of Lord DENMAN, Ch. J., stated that ancient accounts of this sort are never signed.

#### C. Cresswell, for the plaintiff:

[\*38] This is an account of a \*deceased steward, who makes himself liable to his employer; and these accounts are evidence of title. The account is not signed, but it is proved that ancient documents of this sort never are so; and at this distance of time it is impossible that it should be proved by distinct evidence either that this person was reeve to the prior and canons of Bodmin, or that this account is in his handwriting.

#### Cockburn, on the same side:

The prior and canons were not entitled to these tolls in their individual capacity, but in their corporate capacity. The corporate body was dissolved, and their rights transferred to the grantee of the Crown, under whom we claim; and no one could be better entitled to the custody of this account than the present plaintiff.

#### LORD DENMAN, Ch. J.:

I think, that, at this distance of time, this document must be taken to be in the reeve's handwriting.

Butt, for the plaintiff, cited the case of Crease v. Barrett (1).

#### Erle:

I am aware, that, in a case in the Exchequer (2), a chartulary of Glastonbury Abbey, which was in the muniment room of the Marquis of Bath, was decided to be in proper custody, as the Marquis of Bath was the grantee of some of the abbey lands; but, as this account is not signed, it may be only a copy.

#### LORD DENMAN, Ch. J.:

- I think, that, under all the circumstances, I must take this
- (1) 40 B. B. 779 (1 Cr. M. & B. 919). (2) The case of Bullen v. Michel, 16 P., R. 77 (2 Price, 399; 4 Dow. 297).

document to be an original; and I think, also, that it comes from the proper custody. \*An account of this sort would be very likely to be delivered to a purchaser or grantee, the same as a rental would be. I shall receive it in evidence.

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[\*39]

The computus was put in and read.

C. Cresswell, for the plaintiff, proposed to give in evidence a record of the Court of King's Bench, of the 7th Richard the Second, being the record of a case of Osbert Hameley v. John Alweston, which was removed, by certiorari, from the Maritime Court of Padstow to the Court of King's Bench.

This record was headed, "Pleas before the lord the King at Westminster, of the Term of the Holy Trinity, in the 7th year of the reign of King Richard the Second, from the Conquest.

"R. TRESILIAN."

It commenced with stating the writ of certiorari (in hac verba) directed to the "reeve and burgesses of the town of Aldestow," and set out the return to the writ, which stated, that, at the Maritime Court held at Aldestow, Osbert Hameley complained of John Alweston, of a plea of trespass; and that John Alweston was attached, by his ship the Julian of Plymouth, of which John Gofayre was master; and that Osbert Hameley counted against him for taking his ship, "The Mary of the port of Padstow," and for carrying away John Gynes, his servant, the master of that vessel, and the anchors, cables, &c. To which John Alweston says nothing, but that he is the owner of only one-half and a moiety of a quarter of another half of the Julian. The record went on to state, that Osbert Hameley called witnesses, and was adjudged to recover 200 marks from John Alweston; and the bailiffs of the town were commanded to sell John Alweston's share in the Julian. The record went on to state, that afterwards Osbert Hameley, asserting that he was not satisfied, the Sheriff of Cornwall \*was commanded to summon John Alweston to appear in the King's Bench; but the sheriff returned nil: and the Sheriff of Devonshire was commanded to summon John Alweston, and he appeared in the King's Bench, and pleaded that the town of Aldestow is held by the prior of Bodmin, and that the prior hath not cognizance of pleas or the jurisdiction of an Admiralty Court. To this Osbert Hameley replied, that the reeve and burgesses have jurisdiction "of all pleas to the maritime law belonging," "and this he is ready

[ \*40 ]

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[ \*41 ]

to verify;" "and because John Alweston refuses the verification aforesaid, he prays judgment and execution." The record then set out continuances, by Curia advisare vult, for four Terms, when John Alweston came and pleaded the "King's letters patent for the protection and defence of him the aforesaid John, and for all the lands, goods, rents, and all the possessions of the said John," of which letters patent he makes profert, and they were set out verbatim on the record (1), and the record "concluded in the following form: "By pretext of which letters, the plaint aforesaid remains without day."

Erle, for the defendant:

I submit that this record is no evidence in the present action. It is in a cause between two parties under whom neither of the present parties claim. It is res inter alios.

[42] C. Cresswell:

I tender it in evidence to show, that in the reign of Richard the Second there was a port of Padstow, and that it belonged to the prior of Bodmin.

LORD DENMAN, Ch. J.:

I think I must receive it in evidence.

(1) The following is a translation of the letters patent of protection:

"Richard, by the grace of God, King of England and France, and Lord of Ireland. To all his bailiffs and faithful persons to whom these present letters shall come, greeting. Know ye, that we have taken in our protection and defence, John Alweston of Plymouth, who is going in our service to the parts of Brittany, and there to continue with our faithful and beloved John de Roches, Knight, captain of the town of Brest, in defence of the castle and town there, and also of the men, lands, goods, rents, and all the possessions of the said John Alweston; and therefore, we command you, that you maintain, protect, and defend the same John Alweston, his lands, goods, rents, and all his possessions, not permitting any one to interfere or meddle with them, to the injury, molestation, damage, or hurt

of him; and, if any forfeiture thereof hath been made, without delay cause amendment thereof to be made. In witness whereof, we have caused these our letters to be made patent, and to continue for one year. Also, we will that the same John Alweston, in the mean time, shall be quit of all pleas and plaints, except pleas of dower. unde nil habet, and of quare impedit and assize of novel disseisin, and last presentation and attaint, and except the plaints for which he may happen to be summoned before our justices itinerant in their iters. These presents not being the less valid, if it shall happen that he the said John Alweston. &c. there shall not be taken, or after or since the term aforesaid he shall have returned into England from the parts aforesaid. Witness ourself at Westminster, the 22nd day of January, in the ninth year of our reign."

The record was given in evidence.

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Mr. Devon stated, that, from his knowledge derived from other records, he was enabled to state that the place called Aldestow was the same place as Padstow.

Erle proposed to ask Mr. Devon, whether he had not found other records relating to the rights of the priory of Bodmin, besides those produced in this cause?

#### C. Cresswell:

I submit that the question cannot be put, as it is in effect inquiring into the contents of written documents.

#### Erle:

It is like the case of asking as to other bills of exchange.

# LORD DENMAN, Ch. J.:

I think that the question cannot be put. It is not like an inquiry as to a course of dealing.

The question was not put.

A great deal of evidence was given on the part of the plaintiff; but, at the end of the plaintiff's case,

Erle, for the defendant, applied for a nonsuit, on the ground that there had been no material evidence given in London, so as to satisfy the plaintiff's undertaking.

#### C. Cresswell:

I have produced a record from the Tower of London.

It appearing that the Tower is not in the city of London the plaintiff was nonsuited.

[ 48 ]

Nonguit.

Cresswell, Cockburn, and Butt, for the plaintiff.

Erle, Smirke, and Montagu Smith, for the defendant.

1841.

Hereford
Assizes.
[ 157 ]

# REG. v. THE INHABITANTS OF THE PARISH OF PEMBRIDGE.

(Car. & M. 157-164.)

On the trial of an indictment for the non-repair of highways, entries in an ancient parish-book, produced by the churchwarden from the parish chest, were offered in evidence, to show who were the surveyors of the highways in 1707: Held, that the evidence was receivable.

A minute-book, kept by the magistrates' clerk, was offered in evidence, to show who had been appointed by the magistrates to be surveyors of the highways for the year 1812: Held, that this evidence was not receivable without proof of a search for the original appointment, under the hands and seals of the magistrates.

Whether the minute-book would have been receivable as secondary evidence, if the original appointments had been lost—Quære.

A written resolution of a vestry meeting purported to allow to Mr. D. 50%: Held, that evidence was not admissible to prove what was said by the persons who were at the meeting, with a view of showing what the 50% were allowed for.

A witness, who produced an examined copy of a record of a conviction at the Assizes, stated that he examined it with the original record, in the custody of the clerk of Assize, but that he thought the original record was written on paper, but was not sure. It was proved by the son of the clerk of Assize, that all the records in his father's custody were written on parchment, but he had no recollection of this particular record: Held, that the examined copy was receivable in evidence.

INDICTMENT for the non-repair of highways. The indictment contained eight counts, charging the inhabitants of the parish of Pembridge with the non-repair of certain roads within the said parish. Plea to the first count, that the said parish is, and, from time whereof the memory of man is not to the contrary, hitherto hath been divided into six townships; and that so much of the said highway in the first count mentioned as extends from &c., 1,144 yards, is, and from time whereof &c., hath been situate within the township of Weston, and that the residue is, and during all the time aforesaid hath been, situate in the township of Broxwood; and that the inhabitants of the township of Weston, from time whereof &c., have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, independently of the inhabitants of the rest of the said parish, so much and such part of the said highway in the said first count mentioned as is situate within the said township of W.; and that the inhabitants of the said township of B., from time whereof &c., (in the same manner as to the part in B., as above as to the part in W.); and

by reason &c. the inhabitants of W. ought to repair the part in W., and the inhabitants of B. the part in B., independently of the rest THE INHABIof the inhabitants of the said parish. There were other pleas to the other counts \*in a similar form, mutatis mutandis, to adapt them to the other roads mentioned in those counts (1).

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Replication to the first plea, that the inhabitants of the said township of W., from time whereof &c., have not repaired and amended &c., (traversing the custom in the terms of the plea).

There were similar replications to the other pleas.

At the trial, the defendants began, and they proposed to read from an old book, which was produced by a churchwarden from the parish chest, entries, in which the names of the surveyors of the highways were stated, beginning with the year 1707.

## Talfourd, Serjt.:

These entries, although good evidence against the defendants, are not admissible for them.

## COLERIDGE, J.:

I think they are admissible. Could any other evidence be given of who were the surveyors at that time?

The evidence was received.

A clerk to the justices in Petty Sessions produced a book purporting to contain entries of the appointments of surveyors for Pembridge, which he had received from a former clerk, who was dead. He stated, that he had been clerk for seven years, and that, during that time, it had been the invariable practice to appoint the surveyors without any warrant under the hand and seal of the magistrates, and that the only written matter was the entry \*made by the clerk in the book produced. The entry proposed to be read was of the year 1812.

[ \*159 ]

Talfourd, Serjt., Greaves, and Smythies, for the prosecution:

These entries are inadmissible; they are neither primary nor secondary evidence. The best evidence is the appointment itself,

(1) The defendants had previously pleaded, that the parish was divided into six townships, and that each of the six townships from time immemorial had repaired all the roads situate within it, independently of the rest of the parish. They afterwards obtained leave to plead the pleas

above mentioned; and Mr. Justice PATTESON having taken time to consider whether they should have such leave, granted it, at the same time stating that there was no precedent for such pleas; and he very much doubted whether they would be good even after verdict.

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[ \*160 ]

and that, by 13 Geo. III. c. 78, s. 1, must have been under the hands and seals of the magistrates. They are only authorized to appoint in that manner; and it is to be presumed that they did their duty. If the evidence of the witness goes for any thing, it goes to prove that no legal appointments were ever made. only cases in which entries by officers are admitted, are, where there is a public officer, and he has a public duty to perform, and the entries were made in performance of that duty. Here the clerk is no officer: he is the mere servant of the justices, and holds his situation by so infirm a tenure, that a mandamus will not lie to restore him to his situation (1): he may be dismissed instanter; neither is there any duty to perform. There is nothing that requires the clerk to the justices to make any such entry; they are merely the voluntary entries of a person who has no authority to make them, and no duty to perform in making them. Suppose an indictment were preferred against a party for refusing to execute the office of surveyor, it is impossible to contend that these entries would be evidence to prove his appointment. Neither are they admissible as secondary evidence; for no search has been made, or loss proved, of the original appointments; and even if that had been done, these entries would not be secondary evidence, as they are the mere unwarranted entries of the party making them.

# W. J. Alexander, F. V. Lee, and Donville, for the defendants:

This is not secondary evidence, it is the best evidence. We do not require the same strictness of \*proof here as in an indictment against a person for refusing an office. These are the records of a Court, and of the proceedings that have taken place at that Court. The case of Rex v. Martin (2) goes to show that this evidence is admissible.

#### COLERIDGE, J.:

There the Act required that notice should be given, and that the surveyor should be elected at a vestry; and the entry was, that A. was elected. That was all in direct compliance with the Act; but here you are seeking to show an appointment by this sort of evidence in direct contravention of the Act. You are obliged to assume, upon evidence as to a few years' practice, that the justices have acted directly against the provisions of an Act of Parliament.

<sup>(1)</sup> See the case of Ex parte Sandys, (2) 11 R. R. 674 (2 Camp. 100). 4 B. & Ad. 863.

#### W. J. Alexander:

REG.

It is not necessary that the appointment should be strictly regular. THE INHABI-

TANTS OF PEMBRIDGE.

# COLERIDGE, J.:

Perhaps not; but this is merely a parol appointment?

#### W. J. Alexander:

The entry is the only evidence of the appointment. There is no other; it is the only appointment.

#### F. V. Lee:

The question is, whether it is compulsory under the Act to appoint by warrant?

## Coleridge, J.:

Do you mean to say that the magistrates may appoint otherwise than by warrant?

F. V. Lee : [ 161 ]

The acceptance of the appointment is the thing that makes a man an officer.

## COLERIDGE, J.:

The appointment by the magistrate is an absolute appointment. If the persons appointed refuse the office, they are liable to a penalty (1); therefore, it cannot be said to be voluntary: the appointment of a sheriff is absolute, although he may avoid serving by paying a fine.

Talfourd, Serjt., in reply, was stopped by the learned Judge.

# COLERIDGE, J.:

I cannot receive this evidence. It could only be receivable as primary or secondary evidence. I should be bound to presume, that the justices had proceeded according to law; and then the only course to make these books evidence, would be to show, first, that search had been made, and that the warrants had not been found, and then to show that the practice had been to make these entries; but that has not been done. Then it is put, that the entries may be received as primary evidence; that is, that they are

(1) Formerly, under the stat. 13 [And see now 38 & 39 Vict. c. 55, Geo. III. c. 78, s. 1; but now under s. 144, and 56 & 57 Vict. c. 73, s. 25. the stat. 5 & 6 Will. IV. c. 50, s. 8. -J. G. P.].

Reg. c. The Inhabitants of Pembridge. the act of appointment. Now there is an Act of Parliament, which requires an appointment to be made under hand and seal, and the magistrates seem to have chosen not to act accordingly. The whole proceeding has been irregular, and the justices have proceeded in a totally wrong way. The justices, by these entries, no more made these persons legal surveyors, than if I had myself made the appointment.

The evidence was rejected (1).

The resolution of a vestry meeting held the 12th April, 1821, was read; and it purported to allow Mr. Davies a sum of 50l.

[ 162 ] W. J. Alexander proposed to ask what was said by persons present at the meeting.

Talfourd, Serjt., objected.

#### COLERIDGE, J.:

Here is a vestry meeting, which comes to a resolution to allow Mr. Davies 50l.; whatever a person says, when he enters into a written agreement, might be given in evidence, if parol evidence may here be given, in addition to this written resolution.

#### W. J. Alexander:

What is said is explanatory of the resolution.

### Coleridge, J.:

I am very clearly of opinion, it is not evidence. If the meeting meant to guard the resolution by anything in addition to the terms of it, they should have entered it as part of the resolution (2).

For the prosecution, in order to prove the conviction of the parish upon an indictment for non-repair of these roads, in 1806, a witness was called, who stated that he went to the house of Mr. Bellamy, the clerk of Assize of the Oxford Circuit, in London, and there saw him and Mr. Charles Bellamy; that he there asked for the record, and received a written paper, (which he produced), which he and Mr. C. Bellamy compared with a document, also then produced as the record, and which the witness stated, he thought was paper, but he was not sure whether it was paper or parchment; but it was much torn.

<sup>(1)</sup> In a later stage of the cause a witness produced several appointments of the surveyors under the hands and

seals of the magistrates.

<sup>(2)</sup> See the stat. 58 Geo. III. c. 69, s. 2.

Mr. C. Bellamy was called as a witness, but he could not recollect the particular transaction. He stated that the practice was, when a record was required, to make it out from the minutes and the indictment, on an original parchment roll, which was signed by Mr. Bellamy; and \*that a copy was then made on paper, and compared with the roll, and stamped with the Oxford Circuit Stamp, which was given to the party applying for it; and that, as far as his own experience for four or five years went, the roll was drawn up from the indictment and minutes, without any paper draft in the first instance being made; and that he never knew of a paper copy having been kept. Mr. C. Bellamy also stated, that the paper now produced was signed by Mr. Bellamy, and stamped with the Circuit Stamp.

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\*163

W. J. Alexander objected, that there was no evidence of a record on parchment, which was essential. He cited the case of Rex v. Smith (1).

#### COLERIDGE, J.:

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An objection of this kind ought to be made out on the facts. I am by no means satisfied that the original document was not on parchment (2). Mr. Charles Bellamy speaks of the practice, and states, that there is always a parchment record drawn up; and all that can be said is, that the witness is not certain whether this record was upon paper or not. He says, I applied for a record, and it was produced as a record; but I can't say whether it was on paper or on parchment. I think the evidence admissible.

The evidence was received.

Verdict for the Crown.

Talfourd, Serjt., Greaves, and Smythies, for the prosecution.

[ 164 ]

W. J. Alexander, F. V. Lee, and Domville, for the defendants.

(1) 8 B. & C. 341, and Carr. Supp. p. 189. See also the case of *Porter*, Esq. v. *Cooper*, Esq., 6 Car. & P. 354. Lord Chief Baron Comyns says, (Com. Dig. tit. Record A., citing Co. Litt. 117 b and 260 a): "A record is a memorial of a proceeding or act of a court of record, entered in a roll of parchment, for the preservation of it."

(2) There is every reason to suppose that the suggestion, that this record was written on paper, was founded entirely in mistake. We believe that all the records of the Oxford Circuit are and always have been written on parchment. And when even recognizances have been sent by magistrates to the clerk of Assize written on paper, (as they sometimes have been), it has been the uniform practice for the clerk of Assize to send them back, that they might be re-written on parchment.

1842. Jan. 6.

# REG. v. ENTREHMAN AND SAMUT.

(Car. & M. 248-249.)

Central
Criminal
Court.
[ 248 ]

Mode of swearing a Chinese witness.

THE prisoners were indicted for feloniously assaulting one Assang on the 16th of December, and cutting and wounding him on his left cheek, with intent to do him some grievous bodily harm.

The prosecutor Assang was a Chinese, and, not understanding the English language, an interpreter was sworn, and in reply to a question by Gurney, B., said that he was acquainted with the mode of administering an oath to a Chinese witness, and described it in the manner in which it was afterwards administered, adding that he had frequently seen it so administered, and believed it to be binding in that form.

The prosecutor was then called, and on getting into the witness-box immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the Court who swears the witnesses, then, by direction \*of the interpreter, administered the oath in these words, which were translated by the interpreter into the Chinese language,—"You shall tell the truth and the whole truth: the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer."

It appeared from the evidence, that a general quarrel arose between the sailors on board a ship called the *Scalesby Castle*, in the course of which the prosecutor was wounded.

C. Phillips addressed the jury for the prisoners, and they acquitted Samut and found Entrehman guilty of an assault.

Sentence—fourteen days' imprisonment.

1842. Feb. 26. CASTLEMAN v. HICKS.

Hampshire Assizes. [ 266 ] (Car. & M. 266—269; S. C. 2 Moo. & Rob. 422.)

The plaintiff impounded the cattle of S. for rent arrear. The defendant had before claimed the cattle as his own, denying the title of S. Two days after the distress the cattle were missing, and were found in the defendant's barn. The plaintiff brought his action for pound breach under the 2 W. & M. s. 1, c. 5, s. 4, and the defendant pleaded Not guilty, with "by statute" in the margin of the plea: Held, that the statute was not a penal enactment under 21 Jac. I. c. 4, so as to let the defendant into any matters of defence on the issue of "Not guilty:" that the rent due was admitted, and the distraint of the cattle under it, and their impounding,

[ \*249 ]

and the legal sufficiency of the pound; and that the only questions for the jury under the issue "Not guilty," were whether the pound was broken by any other than the cattle themselves, and whether, if so, the defendant broke it.

CASTLEMAN v. Hicks.

Semble—An open field is a pound sufficient at law in which to distrain cattle for rent arrear.

POUND BREACH. Declaration that William Stone, a tenant to the plaintiff, was in arrear of rent, for which the plaintiff had seized his cattle, and impounded them in a certain field; and that the defendant broke the pound and took away the distress.

Plea, Not guilty; (the plea had "by statute" in its margin (1).)

The action was brought under 2 W. & M. sess. 1, c. 5, s. 4, to recover treble damages and costs for the rescue mentioned in the pleadings.

[ 267 ]

It was opened by Erle (Butt was with him), for the plaintiff:

That on the 19th of June, 1841, an execution on a writ of fi. fa. was levied on Stone's effects on a judgment obtained by the Messrs. G. and R. Ledgard, under which the cattle mentioned in the declaration were taken. On the 25th of June, 1841, the defendant served the sheriff with notice that the cattle in question were his property and not that of Stone.

The sheriff, not being indemnified by the attornies for G. and R. Ledgard, then abandoned the execution which he had put in, and the cattle were levied as a distress (2nd of July, 1841) by direction of the plaintiff for rent due 24th of June, 1841, from Stone to him. They were, at the time of the levy, in a certain field, and there they were impounded. The gates of the field had been properly secured by the officer who put in the execution, and were continued secure by him who levied the distress. On the 4th of July, the cattle were missing from the place in which they had been impounded; the gate of the field was open, and there were near it marks of the footstep of a man. The next morning the cattle were found locked up in a barn of defendant's: and, upon his being spoken to of the difficulty in which he would probably involve himself, \*he said he would bring them back, but did not. The action was brought for the supposed taking of the cattle (2).

[ \*268 ]

(1) Rule of Court, T. T. 1 Vict. [See now Order XXI. r. 19; and as to treble costs see 5 & 6 Vict. c. 97, s. 2, and 56 & 57 Vict. c. 61, s. 2.—J. G. P.]

(2) Co. Litt. 476,—"If the distress be taken of goods without cause, the owner may recover; but if they be distrained without a cause, and impounded, the owner cannot break the pound and take them out, because they are in the custody of the law." So in *Cotsworth* v. *Betteson*, 1 Ld. Ray. 104; 1 Salk. 247. In an action for pound breach and rescuing a mare

CASTLEMAN t. HICKS. Crowder, for the defendant (Bere was with him):

The plaintiff goes on the penal clause of the 2 W. & M. sess. 1, c. 5, s. 4; and therefore our plea of Not guilty will open to us any evidence in defence we may think fit to offer to the jury, according to the provisions of 21 Jac. I. c. 4, s. 4. That statute includes actions at the suit of the plaintiff alone, as well as actions qui tam. One branch of our defence will be, that there was a valid execution, and that the goods were in the custody of the law, and, being so, they could not be distrained for rent due by Stone. We shall be shut out of that defence if the facts ought to have been pleaded specially. Again, they have not proved their case, that any rent was due at all; and of that too we shall be entitled to take advantage if this be a penal action.

#### [ 269 ] COLERIDGE, J.:

I do not think that this is a penal action under the stat. of James; and I think, therefore (1), that it is admitted on these pleadings that the cattle were distrained for rent due, and that they were impounded in a good pound, and that the pound was broken; I think this last matter is part of the inducement. The only question raised is, whether the defendant did the act complained of, that is, broke the pound. You may show, for instance, that the cattle escaped of their own accord.

Crowder, to the jury.

# Coleridge, J. (in summing up):

The questions for you on this record are, First, Was the pound broken by any other than the cattle? and, secondly, if it were so,

which had been distrained damage feasant, it was argued that the plaintiff had not entitled himself to maintain the action, for he had not shown any title to the place where he alleged the mare was damage feasant; but the Court said, "The taking of the distress is but an inducement to the action, and the breach of the pound is the gist of the action; it is not necessary to show the cause of the distress so certainly; and Rast. Entr. 444, and all the other precedents in parco fracto, are in this manner." And in The Parrett Navigation Company v. Stower and others, 55 R. R. 729, 733 (6 M. & W.

564, 569, where the above cases are cited in argument, it was said by Lord ABINGER, C. B., in giving judgment, "I think the second count of the declaration is sufficient. It alleges that the plaintiffs had seized a certain barge and coals as a distress for certain tolls which were then due, and had impounded them. Being so impounded they were then in the custody of the law, and the defendants had no right to break the pound and retake them, and in so doing were wrong-doers."

(1) Spencer (Earl) v. Swannell, 49 R. R. 546 (3 M. & W. 154).

then was the defendant the person who broke it? The cattle had Castleman been impounded by law, and I think the pound was a lawful pound. [His Lordship went over the facts.] Lastly, it is in evidence that the defendant promised to bring back the cattle, and did not; and it is for you to say whether his subsequent detention of the distress showed that he was the person who took it.

HICKS.

Verdict for the defendant.

Erle and Butt, for the plaintiff.

Crowder and Bere, for the defendant.

## ALFORD v. VICKERY.

(Car. & M. 280-284.)

Four trustees were joint landlords of a house under a deed of trust; and notice to quit was served upon the tenant, but signed by three of them only: Held, that the notice was sufficient to put an end to the connexion between all the parties as landlord and tenant.

Notice to quit was given, and it expired at Lady Day, 1840: the tenant held on till Lady Day, 1841, but since the former period there had been no payment of rent, nor any other overt act to show that a new tenancy was created. The landlord distrained for rent due at Lady Day, 1841: Held, that the distress was not justifiable. The landlord ought to have sued for use and occupation.

A notice to quit is sufficiently served upon a tenant, if it can be shown that it came to his hands, though the notice had been served only by having been put under the door of the tenant's house (1).

For breaking and entering the plaintiff's house, and TRESPASS. seizing his goods. Plea, that one James Baker held and enjoyed the premises as tenant to the defendant and three others, namely, the Hon. Newton Fellowes, Mr. Northcote, and Mr. Reed, at the yearly rent of five guineas, and that the defendant entered and distrained for a year's rent in arrear at Lady Day, 1841. Replication, non tenuit.

There was a new assignment of trespasses on other occasions, and to them a similar plea was pleaded, justifying an entry to distrain for a year's rent due at Lady Day, 1840. Replication, non tenuit.

The defendant, with the others mentioned in the plea, were

(1) On this point see Tanham v. Nicholson, (1872) L. R. 5 H. L. 561.—J. G. P.

1842. March 18.

Devonshire Assizes. [ 280 ]

ALFORD v. VICKERY. co-trustees of a charity estate belonging to the parish of Chawleigh in Devon. Under the provisions of their trust, they appointed the plaintiff, in 1815, to be schoolmaster of the parish, and for many years he occupied the house in question (which belonged to the trustees, and the yearly rent of which they assumed to be five guineas), as part of his emoluments. He afterwards quitted the house, still continuing schoolmaster. It was then let at a public survey, at which both the plaintiff and defendant were present. James Baker became the tenant, and the rent was received by the defendant, and accounted for by him to the plaintiff up to the year 1838, when Baker refused any longer to pay rent to the defendant, alleging that the plaintiff was his landlord.

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One question of fact was, whether Baker were tenant to the plaintiff or to the persons mentioned in the plea.

The defendant distrained on Baker for the year's rent due at Lady Day, 1840; and, six months before that time the notice to quit, dated 7th September, 1839, was put under the door of the house. Baker's wife proved that the notice was received by her husband, and taken to his attorney before the 29th of September, 1839. It was also proved that Baker quitted possession on the 25th of March, 1840, but he gave up the key to the plaintiff, not to the defendant.

The notice to quit required Baker to give up the house rented by him of the four persons named in the plea, on the 25th of March then next following. It was signed by the defendant, Mr. Fellowes, and Mr. Reed, but not by Mr. Northcote. The defendants began; and at the end of their case,

Erle and Butt, for the plaintiff, submitted among other things, that the plaintiff was at all events entitled to recover; for Baker, supposing him to have been tenant to the four trustees up to Lady Day, 1840, had ceased to be so on the expiration of the notice to quit, and by that notice the tenancy was put to end on that day. After that, had Baker remained in possession as he did, the landlords might have sued him for use and occupation, but they could not distrain for rent, there being no proof of the subsequent payment of rent, or any facts from which a new tenancy at the old rent could be presumed. They cited Jenner v. Clegg (1), Doe d. Aslin v. Summersett (2).

<sup>(1) 42</sup> R. R. 778 (1 Moo. & Rob. (2) 35 R. R. 250 (1 B. & Ad. 135), 213).

Bere and Rowe, for the defendant:

The notice to quit did not determine the tenancy, for it was not signed by all \*the landlords, nor was it served so as to make it binding on either side. And the fact that the landlords distrained for a year's rent due at Lady Day, 1841, is evidence of their having waived the notice, even if the notice were sufficient.

ALFORD v.
VICKERY.

## Erle and Butt, for the plaintiff:

The case of *Doe* d. Aslin v. Summersett (1), decides expressly that a notice to quit by one of several joint-tenants, determines the tenancy as to all, and the plaintiff recovered there in the action upon a joint demise by them all.

Again, if the notice to quit determined the tenancy as \*to three only of the landlords, as the defendant says, and not as to all, then the issue upon non tenuit is disproved, as in Philpott v. Dobbinson (2).

Then, as to the service. The notice came to the hands of the tenant before Michaelmas, 1839, and was acted upon by him, and the landlords cannot now say that the service was defective.

Lastly, the landlords could not waive their notice, at their own option; and there is no evidence of any new tenancy after Lady Day, 1840.

Bere and Rowe, for the defendant, submitted that there was evidence for the jury of a new tenancy, and also that, upon such service as that which had been proved, the landlords could not have supported rejectment. The service, therefore, was not sufficient.

# COLERIDGE, J.:

I am of opinion that the notice to quit put an end to the tenancy as to all the joint lessors; and that, consequently, the relation of landlord and tenant, on the terms stated in this plea, did not exist between the four trustees and Baker after Lady Day, 1840. The distress, therefore, for a year's rent due at Lady Day, 1841, was not justifiable. I am also of opinion that the notice to quit was sufficiently served. It came to the hands of Baker before Michaelmas

- (1) 35 R. R. 250 (1 B. & Ad. 135).
- (2) 3 Moo. & P. 320; 6 Bing. 104, S. C. Where the defendant avowed for an entire rent of 170l., and it appeared that he had only two-thirds of that

rent as tenant in common of the reversion with another not named in the avowry, it was held a variance on non tenuit.

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Day, 1839, and he acted upon it by quitting at Lady Day, 1840. It is equally clear that there is nothing which can go to the jury to show that a new tenancy was created for the year ending at Lady Day, 1841. As to the action, therefore, I think the plaintiff is entitled to recover. The issue upon the plea to the new assignment will depend upon the question whether the \*jury think that Baker, up to Lady Day, 1840, was tenant to the trustees of this charity, or to the plaintiff.

Verdict for the plaintiff generally.

Erle and Butt, for the plaintiff.

Bere and Rowe, for the defendant.

1840. Dec. 23.

In the Common Pleas. [ 361 ]

# MANLEY v. SHAW.

(Car. & M. 361-362.)

On the trial of an action of assumpsit on a bill of exchange, where the cause was undefended, one of the jury said that the stamp was forged, and called the attention of the Judge to the fact: Held, that the juryman must be sworn as a witness to give evidence to his brother jurors, before they can act upon his opinion; and on his declining to be sworn as a witness, the Judge told the jury that they must find for the plaintiff.

Assumesir on a bill of exchange by the plaintiff as indorsee against the defendant as acceptor. Plea, that the defendant did not accept, and two special pleas.

The cause was undefended.

After the handwriting of the defendant as acceptor had been proved, one of the jury, on looking at the bill, said that the stamp was a forgery, and stated to his Lordship, that several respectable houses had been found in possession of forged stamps to a great extent, one of them to the extent of 500l. worth.

J. Jervis, for the plaintiff, submitted, that the verdict must be for the plaintiff, as there was not any evidence to show that the stamp was forged.

#### TINDAL, Ch. J.:

The gentleman of the jury who says that the stamp is a forgery, should be sworn as a witness to give evidence to his brother jurors, before they can act upon his opinion (1).

(1) In the case of Rey. v. Frederick that, where in a criminal prosecution Rosser, 7 Car. & P. 648, it was decided it is essential to prove the particular

His Lordship then told the juryman, that, if he thought proper, he might be sworn and examined as a witness to prove the forgery.

The juryman stated, that he should decline being examined as a witness.

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TINDAL, Ch. J., to the jury:

Then, gentlemen, you have only to find your verdict for the plaintiff.

Verdict for the plaintiff.

J. Jervis and E. James, for the plaintiff.

# HOWARD v. GOSSETT AND OTHERS.

(Car. & M. 380—387.)

Officers of the House of Commons, who have a warrant of the Speaker to take a person therein named, although they may have a right to enter his house (having been peaceably admitted) and to search the house, they have no right, in case they do not find him, to remain there to await his return; and if they stay several hours in the house for that purpose they are trespassers ab initio.

In opening a case, a plaintiff's counsel has a right to refer to and comment on an Act of Parliament which has passed since the transaction which is the subject of the action, as it may go to show what the law was before the passing of the Act, but he has no right to state what occurred in the progress of the Act through the Houses of Parliament, such as that counsel were heard against its passing, because he would not be entitled to go into evidence of such facts.

TRESPASS. The first count of the declaration stated, that on the 4th of February, 1840, the defendants broke and entered the plaintiff's house, situate No. 7, Norfolk Street, in the parish of Saint Clement Danes, in the county of Middlesex, and remained there making a great noise and disturbance for twenty-four hours, and broke open and injured divers doors and locks. Second count, that the defendants, on the same day, after having broken and entered the house on pretence of searching for the plaintiff, and after the expiration of a reasonable time for making such search, and after they had in fact made it, again broke and entered the plaintiff's house, and remained there two hours encumbering it.

Pleas: first, as to the breaking the doors and injuring the locks,

value of an article, the jury may use that general knowledge which any man can bring to the subject; but if any of the jurors has a particular knowledge of the subject, arising from his being in the trade, he ought to be sworn and examined as a witness. 1842. Dec. 5.

Sittings at Westminster.
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[ \*381 ]

Not guilty; and second, as to the residue of the trespasses, that, on the 27th of January, 1840, a Parliament was held at Westminster, and that the plaintiff was ordered by the House of Commons to attend that House forthwith on a charge of contempt; that the plaintiff disregarded the order, and secreted himself to avoid the execution of any warrant, whereupon the House of Commons, on the 4th of February, 1840, resolved that the Speaker should issue his warrant to have the plaintiff brought up in custody of the serjeant-at-arms; that the warrant was \*issued and delivered to Sir William Gossett, then being serjeant-at-arms, and by him delivered to the defendants as his deputies to execute; and because the said house was the residence of the plaintiff, and a likely place wherein to find him, the defendants went there, and having knocked at the outer door were peaceably admitted, and made search for the plaintiff, and remained as in the first count mentioned, but did not find the plaintiff there; and because it was a likely place to find the plaintiff, they the defendants did, for the purpose of executing the said warrant and whilst it was in force, peaceably and quietly (the outer door being open) go in, break, and enter the said house and continue there as in the second count mentioned.

Replication: to the plea of Not guilty, a similiter; and to the second plea, so far as the same relates to the trespasses in the first count of the declaration mentioned, that the Speaker of the House of Commons did not authorize the serjeant-at-arms by warrant in manner and form as pleaded; and so far as the said plea relates to the trespasses in the second count of the said declaration, that true it is that a Parliament was holden as in the plea mentioned, and true it is that the resolution was made by the House of Commons as in the plea mentioned, and true it is that the Speaker issued his warrant as in the plea is mentioned, nevertheless the defendants, of their own wrong and without the residue of the cause pleaded in justification, committed the trespasses in the second count mentioned.

It was opened by *Platt*, for the plaintiff, that in the year 1837 a report was made by the inspectors of prisons under the stat. 5 & 6 Will. IV. c. 38, in which it was stated that a book was found in one of the prisons which was published by a person named Stockdale, and the inspectors of prisons in that report gave a character to that book which if not true was libellous. If this report had been circulated only among the members of the House of Commons there

would have been nothing to complain of, but instead \*of that the House of Commons authorized Messrs. Hansard to publish it and sell it to every one who chose to purchase it, and Mr. Stockdale, insisting that the book was a medical work and that the inspectors of prisons were mistaken in the character of it, brought his action against Messrs. Hansard for a libel, and Messrs. Hansard in that action pleaded two pleas, the one denying the publication, and the other asserting that the work was of the character imputed to it, and on the trial of that cause the then Attorney-General (1) contended that the authority of a resolution of the House of Commons justified the publication of a libel; but Lord DENMAN, Ch. J., who tried the case, distinctly laid down (2), that the fact of the House of Commons having directed Messrs. Hansard to publish all the Parliamentary reports was no justification to them if such publication contained a libel. Soon after that the House of Commons appointed a committee to inquire into the subject of privilege; and on the 8th of May, 1837, that committee reported that the power of publishing such of its reports as it should deem conducive to the public interests was an essential incident to the constitutional functions of the House of Commons, and that the prosecution of any action for the purpose of bringing any of the privileges of the House of Commons into discussion elsewhere than in Parliament was a high breach of privilege. After that report of the committee, the sale of the report of the inspectors of prisons being still continued, Mr. Stockdale brought a second action against Messrs. Hansard; and on the 8th of June, 1837, it was moved and carried in the House of Commons that Messrs. Hansard should be permitted to plead to that action, which they did, justifying under the supposed jurisdiction of the House of Commons. That plea was demurred to, and on the 31st of May, 1839, the Judges of the Court of Queen's Bench decided that it was no justification (3) to Messrs. That case then went to a jury, who gave Mr. Stockdale \*Hansard. However, Messrs. Hansard still continued to sell 100l. damages. the report of the inspectors of prisons; and on the 26th of August, 1839, Mr. Stockdale brought a third action against them, in which they suffered judgment to go by default, and the jury in the writ of inquiry in that action gave Mr. Stockdale 600l. damages. sheriffs tried to stay the proceedings (4), but could not succeed in

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<sup>(1)</sup> Sir John (afterwards Lord) (3) 2 P. & D. 1. Campbell, (4) 8 Dowl. P. C. 148.

<sup>(2) 7</sup> Car. & P. 731.

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doing so, and a writ having issued commanding them to levy on Messrs. Hansard, it was, on the 16th of January, 1840, moved and carried in the House of Commons that Mr. Stockdale, Mr. Howard (the present plaintiff, who was his attorney), the sheriffs, the undersheriffs, and the sheriffs' officer, should appear before the House; and on the 22nd of January, after the sheriffs had been imprisoned on a vote of the House of Commons, a rule was made in the Court of Queen's Bench commanding the sheriffs to pay over the money levied in the third action to Mr. Stockdale. The publication of the report of the inspectors of prisons still continuing, Mr. Stockdale, on the 23rd of January. 1840, brought a fourth action, and still employed the present plaintiff as his attorney in it; and on the 4th of February, at about half-past seven in the evening, two of the defendants came to the plaintiff's house in Norfolk Street, and after they had been told that the plaintiff was not there, they searched the house from top to bottom, and having satisfied themselves that the plaintiff was not there, said that they would stay till the plaintiff came back. A letter from the plaintiff was shown to the defendants, which stated that the plaintiff would attend the House of Commons on the following day, but the defendants persisted in staying in the house, and did so till half-past one on the following morning, when a person came and directed them to withdraw, which they did. On the following day, the plaintiff attended the House of \*Commons, and avowed that he had done his duty, and the result was that he was sent to Newgate, where he remained from the 6th of February to the 14th of May (1); and after the committal of the plaintiff, the House of Commons passed a bill with unseemly haste to protect themselves, and inserted a clause to prevent the plaintiff from asserting his rights. This was the stat. 3 Vict. c. 9 (2).

[ \*384 ]

### Pollock, A.-G.:

I submit that Mr. Platt has no right to quote an Act of Parliament which was passed after this action was brought.

# LORD DENMAN, Ch. J.:

I think he may refer to the Act with a view of showing what the law was before it passed, but not go into the history of the passing of the Act.

<sup>(1)</sup> See Howard v. Gossett, (1845) 10 (2) See Stockdale v. Hansard, 52 Q. B. 359, 14 L. J. Q. B. 367.—J. G. P. B. R. 347 (11 Ad. & El. 297).—J. G. P.

Platt:

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An attempt was made in this bill (as originally brought in) to stop the present action, and the plaintiff petitioned the House of Lords against it. I myself appeared at the Bar of the House of Lords as counsel.

#### LORD DENMAN, Ch. J.:

Mr. Platt, you are now going too far; you could not go into evidence of what you are now stating.

It appeared from the evidence of Mr. Howard, jun., the son of the plaintiff, and Mr. Pearce, one of his clerks, that on the evening of the 4th of February, at about seven o'clock, Mr. Stein and Mr. Bellamy, two of the defendants, who were officers of the House of Commons, came to the house of the plaintiff and stated that they had the Speaker's warrant against the plaintiff, and that they must search the house, which they did; and that not finding the plaintiff, Mr. Bellamy said that they must stay in the house till the plaintiff returned, however long that might be; and that at about half-past one on the same night, Captain Gossett, the assistant serjeant-at-arms of the House of \*Commons, came and desired Mr. Bellamy to read the Speaker's warrant, which he did; and that by about twenty minutes past one all the defendants had left the plaintiff's house. It was also proved, that soon after Mr. Bellamy and Mr. Stein came to the plaintiff's house, Mr. Howard, jun., showed them a letter from the plaintiff, which stated that he would attend at the House of Commons on the following day. From the cross-examination it appeared that the conduct of the defendants was perfectly gentlemanlike, and that there was not the slightest incivility or rudeness on either side.

## Pollock, A.-G., for the defendants:

The plaintiff upon this record does not deny to the House of Commons the right they contend for, and the letter of the plaintiff shows that he did not intend to set himself against the authority of the House of Commons, if properly exercised—on the contrary, it is quite clear that the plaintiff intended to attorn to their jurisdiction. I admit that the defendants, who are officers of the House of Commons, have been guilty of an irregularity in the execution of their warrant. They stayed in the house of the plaintiff after they knew that he was not there, intending to await his return; and that

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they had no right to do, as those who have the execution of a warrant, although they have a right to enter the person's house, and to search his house to find him, and to be in the house a reasonable time for the purpose of making that search, have no right to stay in the house till the party comes back. The plaintiff's declaration consists of two complaints: the one the entering the house and breaking the doors and locks; and the other the staying in the house. I am bound to admit that the defendant's staying in the house cannot be justified; and that that being so, the defendants were trespassers ab initio and the case is therefore a question of damages only; and the case, so far from raising any question on the jurisdiction of the House of Commons, entirely admits it. If the \*plaintiff had intended to raise the constitutional question he should have demurred to the plea; instead of which, as to one part of the case, he denies the issuing of the Speaker's warrant as a matter of fact, which renders this a question of excess of jurisdiction, in which the jurisdiction itself is not affected to be denied. It was held, in the Six Carpenters' case (1), that if a party having a writ or warrant to execute is guilty of an excess, that renders him a trespasser ab initio, and the writ or warrant does not protect the party even to the extent to which it would have protected him if he had not been guilty of excess; and this was so even in the case of any excess committed in distraining for rent, before the stat. 11 Geo. II. c. 19; and the present defendants are in the same situation as a sheriff who, though both himself and his officer would be protected in executing the Queen's writ, is still liable to an action if he or his officer is guilty of an excess.

LORD DENMAN, Ch. J. (in summing up):

The defendants have pleaded a justification that they were acting under the warrant of the Speaker of the House of Commons; and the plaintiff, by his replication as to the trespasses in the first count of the declaration, denies the warrant; but as to the trespasses in the second count, the plaintiff admits the resolution of the House of Commons, and the warrant as stated in the plea, and denies only the residue of the justification; but with reference to the amount of damages, we must look at the whole case. It is properly admitted by the learned Attorney-General, that all that the defendants did, in remaining in the house for the purpose of taking the plaintiff when he should come back, cannot be justified; but the plaintiff also

admits, that, as to the searching the house, the defendants may be justified.

HOWARD v. Gossett.

Platt:

No warrant has been given in evidence; and, as to the trespasses in the first count, the warrant is denied.

## LORD DENMAN, Ch. J.:

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No doubt all the issues must be found for the plaintiff, except as to breaking the doors and locks, which did not occur; but, as to the question of damages, we cannot shut our eyes to the fact, that, in replying as to trespasses in the second count, the plaintiff admits that a warrant was issued by the Speaker; and I think it is pretty clear upon the evidence, that the search was made under it; but it is also conceded, that the defendants by unlawfully staying in the house after the search was made became trespassers ab initio, and that prevents them from availing themselves of what would be otherwise a justification up to that point. The defendants seem to have acted without the least appearance of malice, and thinking they were justified in what they did; still the plaintiff's business must have been interrupted, and his family put to great inconvenience under a claim of a right which cannot be justified in point of law; and those persons, who have to execute extraordinary powers upon great and extraordinary occasions, ought, before they act, to inform themselves of the extent of their powers. You will therefore say what just and reasonable compensation these defendants, who are officers of the House of Commons, should make for this trespass, that their warrant from the House of Commons did not authorize.

Verdict for the defendants, as to the breaking of two doors and locks; and as to the residue, for the plaintiff. Damages 100l.

Platt, Kelly, and Petersdorff, for the plaintiff.

Pollock, A.-G., Follett, S.-G., Crompton, and F. Pollock for the defendants.

#### KEMP v. KING.

1842. Dec. 7.

(Car. & M. 396-399; S. C. 2 Moo. & Rob. 437.)

Sittings at Westminster.

A Judge at Nisi Prius will not compel a witness to produce a document under a subpæna duces tecum, if, as against the party asking its production, the witness has a lien on the document which is called for (1).

Case for maliciously suing out a fiat in bankruptcy against the plaintiff. \* \* \*

On the part of the plaintiff, the order for superseding the fiat in bankruptcy, which had issued against the plaintiff, was put in.

[ 397 ] On the part of the plaintiff, Mr. Heathcote was called upon, under a subpæna duces tecum, to produce a deed between the plaintiff of the one part, and Mr. Clark of the other part. Mr. Heathcote objected to producing it, stating, \*that he had a lien on it. He stated that he had a lien upon it as against the present plaintiff.

Erle, for the plaintiff:

I submit that the witness is bound to produce the deed, as by the production of it he would not lose his lien.

#### LORD DENMAN, Ch. J.:

If he puts it in when you call for it he in effect parts with the lien which he has on it, as against your client; I shall not compel him to produce it.

The deed was not produced (2).

[ 399 ] At the end of the plaintiff's case, Lord Denman, Ch. J., being of opinion that a want of probable cause was not shown,

Erle, for the plaintiff, elected to be nonsuited.

Nonsuit.

Erle and E. James, for the plaintiff.

Kelly and Bramwell, for the defendant.

G.M. & G. 331; Re Cameron's Coalbrook Railway Co., (1857) 25 Beav. 1.—J. G. P. (2) See the case of Thompson v.

(1) See Hope v. Liddell, (1855) 7 De

Mosley, 5 Car. & P. 501, in which Lord LYNDHURST, C. B., held that a person having a lien upon a document is no objection to his producing it on a trial at Nisi Prius; but that, if he fears it may be abstracted, the Judge will allow him to stand by the witness while the witness is examined respecting it. In that case it did not appear that the witness claimed any lien as against the person requiring the production of the document.

#### BROWN v. JOHNSON.

(Car. & M. 440—448.)

1842. June 7.

Sittings in London. [440]

By a charter-party a ship was to proceed to Honduras and there load, "at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce," a cargo of mahogany and logwood. freighter by letter directed the captain to proceed to Belize in the bay of Honduras, and address himself to Mr. S., "who will furnish you with a homeward cargo of mahogany and logwood agreeable to charter-party."—The captain took the ship to Belize, where Mr. S. put a small quantity of logwood on board and directed the ship to go to Ulna, where about half a cargo was put on board. Mr. S. then sent the ship to two other places of loading in Honduras, at which the cargo was completed: Held, that it was a question for the jury whether the ship was sent to Belize as her port of loading; and that if she was, the freighter was liable for the extra expenses of her going to all the other places for the residue of her cargo; but that, if Belize was not to be considered her port of loading, Ulna certainly was, and the freighter would at all events be liable for the extra expense of her going for cargo to other places after Ulna, as by the charter-party the freighter was to load at one of the usual ports or places of loading in Honduras.

In the absence of any custom, Sundays are to be computed in the calculation of the lay days at the port of discharge (1).

Assumpsit. The declaration stated, that, on the 30th of April. 1841, by a certain charter-party then made, it was agreed by the plaintiff, therein described as the owner of the ship Trinidad, and the defendant, that the ship should proceed to Honduras and there load, "at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce, a full and complete cargo of mahogany, with logwood or log-ends for broken stowage only, and proceed to a good and safe port of discharge in the United Kingdom." "Twenty-five running days for every hundred tons of mahogany were to be allowed the said merchant, if the ship were not sooner dispatched, for loading the said ship at Honduras, and fifteen days for discharging at her destined port in the United Kingdom, and thirty days on demurrage over and above the said loading days, at 6l. per day." The declaration then went on to aver. that the \*ship had sailed to Honduras and arrived there, being consigned to one Joseph Swasey, the agent of the defendant, and at one of the usual and customary ports and places there, to wit, Belize, was ready to load. Breach, that the defendant did not nor would load on board the ship a full and complete cargo at one of the usual and customary ports and places of loading, including the rivers Ulna and Dulce, but, on the contrary, in order to obtain such

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<sup>(1)</sup> See on this point the same case on a motion for a new trial, reported 62 R. R. 632 (10 M. & W. 331).

Brown v. Johnson. cargo, the plaintiff was forced and obliged, and the defendant's agent required him, to go from Belize to another port in Honduras, to wit, to Amoa, and from thence to another place of loading in Honduras, to wit, to Ulna, and from thence back again to Amoa, and from thence to another place of loading in Honduras, to wit, Monkey River, and from thence back again to Belize aforesaid; by reason of which the plaintiff was obliged to expend divers sums of money. There was also an averment that the ship brought a full cargo of mahogany to Hull, the plaintiff having orders from the defendant to proceed thither, and there delivered the cargo; and that the defendant did not nor would discharge the said cargo at Hull within the said number of fifteen days in the said charter-party in that behalf mentioned, but detained the ship for six days after the said fifteen laying days-whereby a sum of 1,327l. 7s. 2d. became due to the plaintiff for freight, and 36l. for demurrage: and although part of the sum due for freight, to wit, 1,312l. 9s. 6d. had been paid, yet the defendant refused to pay the residue of the said freight, and would not pay any part of the said sum so due for demurrage as aforesaid.

Pleas: first, non assumpsit. Second, "as to the said supposed breach of promise in the said declaration first above assigned," that the defendant did load a full and complete cargo, according to the charter-party, at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce, according to the form and effect of the said charter-party (concluding to the country). Third, as to the residue of the declaration, that the plaintiff \*did not deliver the said cargo, or any part thereof, to the defendant as in the declaration is alleged (concluding to the country). as to so much of the declaration as relates to the non-payment of the residue of freight, that the defendant had paid it. so much of the declaration as relates to the non-payment of the residue of the freight, that, by the neglect and default of the plaintiff's servants, a portion of the cargo was damaged, and that it was agreed between the plaintiff and the defendant that the defendant should abandon all claim for the damage, and the plaintiff abandon all claim for the residue of the freight (concluding with a verification). Sixth, "as to so much of the said declaration as relates to the said supposed demurrage in the said declaration mentioned," that the defendant did not detain the ship over and above the said fifteen laying days in the charter-party mentioned (concluding to the country). Seventh, as to the supposed demurrage,

[ \*442 ]

that the defendant would have discharged the cargo within the number of fifteen days in the charter-party mentioned, but was prevented so doing by the wrongful act, procurement, neglect, and default of the plaintiff, his servants and agents (concluding to the country).

Brown
t.
Johnson.

Replication to the first, second, third, and sixth pleas, a similiter; to the fourth plea, a denial of the payment; to the fifth plea, a denial of the agreement in that plea mentioned; and to the last plea, de injuriâ.

The charter-party was put in. It was dated the 30th of April, 1840; and by it the ship Trinidad was to proceed to Honduras, "and there load from the factory of the said merchant, say at one of the usual and customary ports and places of loading, including the rivers Ulna and Dulce, a full and complete cargo of mahogany, with logwood or log-ends for broken stowage only;" "and, being so loaded, shall therewith proceed to a good and safe port of discharge in the United Kingdom," "and there deliver," upon being paid freight for mahogany at the rate of \*3l. 17s. 6d. per ton, and for logwood or log-ends 1l. per ton. "Twenty-five running days for every 100 tons of mahogany are to be allowed to the said merchant, if the ship is not sooner dispatched, for loading the said ship at Honduras, and fifteen days for discharging at her destined port in the United Kingdom, and thirty days on demurrage over and above the said laying days, at 6l. per day."

[ \*448 ]

A letter of instructions from the defendant to Captain Huntley Brown, the captain of the *Trinidad*, dated May 30th, 1841, was put in, of which the following is an extract: "Sir,—Having chartered your vessel for a return cargo from Honduras to a port in the United Kingdom, you will now be pleased to proceed and make the best of your way for Belize, in the bay of Honduras. On your arrival there, you will address yourself and vessel to my friend Mr. Joseph Swasey, who will furnish you with a homeward cargo of mahogany and logwood, agreeably to charter-party; which being completed, you will then proceed homeward, calling at Cork for orders, at which port the necessary timely instructions as to your port of destination will be awaiting your arrival," &c.

It was proved by Captain Huntley Brown, that in consequence of this letter he proceeded with the ship to Belize, and arrived there on the 17th of September, 1840, when he reported himself to Mr. Swasey, who, after putting about twenty tons of logwood on board the ship, directed him to proceed to Amoa, which he objected to do; but, after objecting, went thither because he was not able to get cash to carry on the ship without doing so, unless he had executed

Brown c. Johnson,

[ \*444 ]

a bottomry bond. It was further proved by Captain Huntley Brown, that he, by the direction of Mr. Swasey's agent, proceeded to Ulna, where about half a cargo of mahogany was put on board, and thence to Amoa again, and thence to Monkey River, where about one-third of a cargo was put on board, and thence to Belize again, where the residue of the cargo being obtained from Mr. Swasey, the ship sailed for England on the 25th of \*November, 1840, and arrived at Hull (the port directed by the defendant) on the 1st of February, 1841, and was reported on that day, and got into the Hull Docks, and was put in the charge of the Dock Company's officers on that afternoon. This witness stated, that the extra expense of going to the different places at Honduras amounted to 1571.

It was proved by Mr. Brown, that the discharging of the cargo commenced on the 4th of February, and was completed on the 23rd, the ship not having been got to the dock side till the 4th, by reason of the crowded state of the docks.

The entry in the books of the custom-house at Hull was put in, which showed that the ship was reported on the 1st of February.

S. Martin addressed the jury on the facts of the case, and opened evidence on the fifth plea; and with respect to the demurrage, he submitted that the fifteen days were to computed from the time the ship was put in a condition to deliver her cargo, and that it was contrary to good sense that the time should begin before the ship was able to unload, and therefore that the time ought in this case to be calculated from the 4th of February, and the Sundays, which were the 7th, 14th, and 21st of February, be excluded.

### ALDERSON, B.:

The general rule of law is, that "days" mean consecutive days, except Sunday is the first or the last day; but in mercantile cases it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage.

[445] Evidence was given with a view of proving the fifth plea, but on this part of the case no question of law arose; and evidence was also given that the cargo was discharged \*by a lumper, and that there was no unnecessary delay.

### Whateley, in reply:

I submit that the plaintiff is entitled to demurrage from the time the ship was reported to be ready for discharging till the last day when the last portion of her cargo was taken out, and that in computing the time the Sundays should be reckoned.

Brown v. Johnson.

ALDERSON, B., (in summing up):

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The second plea states, that the defendant did load in and on board this ship a full cargo according to this charter-party at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce; and to show that he did not a letter is put in, by which he directs the ship to go to Belize, where a part of the The letter does not in terms direct him to cargo is put on board. Belize for his cargo. It is for you to say, whatever ambiguity there may be in the letter, whether the conduct of the parties does not fix Belize as the port of loading. It is not material to the verdict whether Belize was the port of loading or not, because if Belize was not, Ulna certainly was; and at all events the defendant cannot say that he put a full cargo on board at any one port, which he was bound to do. Still it is important with respect to the damages; for, if Belize was not the port to which the ship was directed as the port of loading and Ulna was, the plaintiff cannot charge anything for additional expenses in going to Ulna. With respect to the claim for demurrage, it appears that the ship arrived at Hull on the 1st of February, and on that day was reported, and was also put in the charge of the Dock Company's officers, and that she got to her berth on the 4th. Now the period from which the days count is from the time the vessel arrives in the dock and is in the management of the Dock Company's or harbour-master's officers, and, when neither party is to blame, the number of days run from the time when the ship is in a dischargeable state, and if no period is mentioned the cargo is to be discharged in a reasonable time, to commence from the time when the ship is in a state to begin delivering, therefore I \*think that demurrage should be calculated from the 1st of February, unless it were shown that the lapse of time arose from the plaintiff's own negligence; and if it did you ought, as to this part of the case, to find for the defendant.

[ \*448 ]

Verdict for the plaintiff on all the issues, with 1511.

damages on the first issue; the jury also giving damages for three days' demurrage, and stating that they did not deduct the Sundays.

Whateley and H. Hill, for the plaintiff.

Jervis and S. Martin, for the defendant.

1842. Dec. 2.

### MACNAMARA v. HULSE AND OTHERS.

(Car. & M. 471-478.)

Sittings at Westminster.

Semble, that if an invention, for which a patent is granted, would, if put into practice, be useful, an action for the infringement of the patent may be maintained, although the plaintiff's invention has never been put into actual use, except by the defendant, when he infringed the patent (1).

A specification which leaves it to experiments to determine how the

invention is to be carried out is not good.

If a patent be taken out for blocks for paving with "stone or any other suitable material," this will include wood pavement, although no wood pavement was in actual use at the date of the patent, and although the inventor might not have had wood pavement in his contemplation.

CASE for the infringement of a patent, dated 15th of March, 1837, for "certain improvements in paving, pitching, or covering streets, roads, and other ways." The declaration, besides the usual breaches, that the defendants used the plaintiff's invention. &c., stated that the defendants did make and cause to be made large quantities of wooden blocks, for the purpose of paving roads, streets, and ways according to the improvements of the plaintiff, and in imitation of his invention. Pleas, first, Not guilty. Second, that the plaintiff was not the true or first inventor. Third, that the said invention was not, at the time of making and granting the said letters patent, a new invention within this realm, but had been and was publicly practised and used before. Fourth, that the nature of the said invention, and the manner in which the same was and is to be performed, were not nor are particularly described or ascertained by the specification. Fifth, that the said invention was not nor is of any public use or benefit. All the defendants' pleas concluded to the country, except the third, which concluded with a verification. Replication to the third plea, that the said invention was, at the time of the making and granting the said letters patent, a new invention within this realm, and had not been nor was publicly practised or known before that time (concluding to the country).

[ \*472 ]

The defendants had, under the stat. 5 & 6 Will. IV. c. 83, \*s. 5 (2), given to the plaintiff a notice of sixteen objections, which were in substance as follows: First, that the mode of paving described in the letters patent was not new.

Second, that the invention does not show any new method of cutting the materials.

<sup>(1)</sup> See Hinks & Son v. Safety Lighting Co. (1876) 4 Ch. D. 607, 616. (2) Repealed by 46 & 47 Vict. c. 57, ing Co. (1876) 4 Ch. D. 607, 616. s. 113; but see now s. 29 of that Act. Otto v. Linford (1882) 46 L. T. 35, 41.

Third, "that, at the time of granting the letters patent, wood MACNAMARA pavement was not practised or known in England, and the term 'paving' or 'pitching' signifies a road laid with stones endwise; and throughout the whole patent the word 'wood' is not used, but only stone or other suitable materials of a similar nature, such as marble, granite, or any mineral substance, but not vegetable substance."

Fourth, that the patent does not apply to any pitching or covering of wood, and is not applicable to, and does not authorize the making roads with wood.

Fifth, that the specification was not sufficient, because it did not state any invention, any novelty, any new process, or any new result from an old process.

Sixth, that the plaintiff's claim is for all shapes, forms, and bevils, and no angle is defined in the specification.

Seventh, that the plan and section do not agree.

Eighth, that no exact depth of the materials is given.

Ninth, that the specification sometimes says half stones to be against the curb, but the section does not show it.

Tenth, that iron and brick roads were tried after the invention \*and patent, and that, so far as they are included in them, they are of no practical benefit or advantage.

[ \*478 ]

Eleventh, that the supposed invention is of no public benefit or advantage.

Twelfth, that it was not new.

Thirteenth, that the title of the patent is insufficient and inapplicable, if it was intended thereby to extend to wood pavements, such as have been put in practice and used by the defendants.

Fourteenth, that the specification is insufficient, because it does not describe the invention so that it is fully disclosed and made known to the public.

Fifteenth, that by the specification it is not described whether the sides of the materials should be laid down at right angles with the base, or with each other, or at any angle, or in what figure; nor do the drawings supply that defect, nor does the length, breadth, or depth of the stones or other materials appear.

Sixteenth, that the depth, breadth, and length of the stones or other substances will depend on the mineral or vegetable substances used, whereas neither the specification nor drawings point out nor define what differences will be created, or how met or disposed of.

MACNAMARA v. Hulse.

1 \*474 ]

It was opened by Pollock, A.-G., for the plaintiff, that the plaintiff had invented a block which was useful for wood pavement, the plaintiff's block being in the form of two solid rhombs, placed one in front of the other in opposite directions, so that each side of one of the plaintiff's blocks was bevilled both inwards and out-This block had been imitated by the defendants, each of whose blocks consisted of a single solid rhomb, and the defendants then fastened their blocks together by pins, so that two of the defendants' blocks fastened together by the pins, as they were intended to be, were exactly the same as one of the blocks of the plaintiff; and if one of the plaintiff's blocks were cut in half, so as to detach from each other the two solid \*rhombs of which it consisted, the two parts would be each of them the same as one of the defendants' blocks. It appeared from the defendants' objections, delivered under the 5th section of the stat. 5 & 6 Will. IV. c. 83, that it was to be objected that the plaintiff's patent was not taken out for wood pavement, and that the defendants meant to rely on sixteen different objections.

### LORD ABINGER, C. B.:

Whatever objections the defendants may have given you notice of they cannot go beyond their pleas. I apprehend that the statute does not make the notice of objections stand in the place of pleas.

## Kelly, for the defendants:

The notice of objections merely states more particularly what the pleas state more generally.

### Pollock, A.-G.:

The objection is, that wood is not specifically mentioned either in the patent or in the specification.

## LORD ABINGER, C. B.:

This is not a patent for wood pavement, it is for paving without any limit as to material.

On the part of the plaintiff an examined copy of the specification was put in. It was dated the 1st of September, 1837, and was as follows:

"My invention consists in an improved mode of cutting or forming stone, or other suitable material, for paving or covering roads or other places, such as roofs of buildings, or floors, as here- MACNAMARA after described." (Here followed a description of a drawing annexed to the specification. There was no scale attached to the drawing, and the precise angle at which the bevils were to be made was not stated.) And it concluded—"And I would have it understood, that what \*I claim is the mode herein explained of forming or working the stones or other materials to the figures A. or B., for the purpose of producing better paving, pitching, or covering of streets, roads, and ways, and other purposes, as above described."

Hulse.

[ \*475 ]

It was proved by Mr. Bebbington that he had made seven of those blocks for the plaintiff, who had shown him a copy of the specification and drawing, and also given him some verbal directions: but he stated that any person of competent skill could have made the blocks from seeing the specification and drawing only, without any verbal explanation or direction; and that, although the precise angle at which the bevils were to be made was not stated, that could not, in the witness's judgment, be material, as a bevil at any angle would be to some extent useful.

It was proved by Mr. Robertson, the Editor of the "Mechanics' Magazine," that the subject of wood pavement had been discussed among scientific men before the year 1837; and Mr. Robertson also stated that he considered that the plaintiff's invention would be useful, and that the novelty of it consisted in the obtaining mutual support by the bevilling outwardly and inwardly on the same side of the block.

Mr. Gibbs, a civil engineer, stated that in his judgment the plaintiff's invention would be useful, "if put into practice;" but that the angle at which the bevils should be made would be material.

### Kelly, for the defendants:

I submit that there is no case to go to the jury on the fifth issue. in which the defendants say that the plaintiff's invention is of no public utility. The plaintiff has on that issue to prove that it is useful, but there is no evidence of any one block made according to the plaintiff's method ever being used any where from the year 1837 to the present time—the only evidence being the speculative MACNAMARA opinions of two witnesses, that, if carried into effect, the invention HULSE. would be useful.

[476] LORD ABINGER, C. B.:

The plaintiff says that your clients have carried it into practical effect and have found it useful.

Kelly:

There is no proof that there were any of these blocks made.

LORD ABINGER, C. B.:

The first witness made some for the plaintiff.

Kelly:

They were not intended to be used.

LORD ABINGER, C. B.:

It shows that they were ready.

Kelly:

I submit that it must be shown that the invention has been brought into use; but I am quite content if your Lordship will give me the benefit of the objection hereafter.

LORD ABINGER, C. B.:

Surely.

Kelly:

I submit, further, that, as the plaintiff claims as his invention the bevilling inwards and outwards on the same side of one block, the defendants have not pirated that, as they have never had any block bevilled both inwards and outwards on the same side.

LORD ABINGER, C. B.:

That is a matter of fact. It will be for the jury to say whether they think the defendants' blocks in effect the same as the plaintiff's.

Kelly:

There is also in the specification no direction whatever as to the angle at which the bevils are to be made.

LORD ABINGER, C. B.:

One of the plaintiff's witnesses says that the precise angle of the

bevil is important, but \*another of the witnesses says that any Macnamara angle will be of some use. It will be for the jury to say whether any particular angle is essential, or whether any angle whatever is useful and beneficial. It must be less than a right angle, because if it was a right angle it would not be a bevil. specification leave it to experiment to determine what is the proper angle, it is not good; but if any angle is a benefit, it will do.

HULSE. [ \*477 ]

#### Kellu:

I submit, further, that the plaintiff's patent does not apply to wood pavement. There was no wood pavement in actual use in the year 1837, which is the date of his patent; and then comes the question whether it can extend to any thing but stone or something then used.

#### LORD ABINGER, C. B.:

I think that the words "any other suitable material" include a wood pavement, though probably the plaintiff never contemplated it.

Kelly addressed the jury for the defendants, and stated (inter alia) that the plaintiff's invention was not new, because a person named M'Carthy had, in the year 1818, taken out a patent for a pavement, in which each block was to have two bevils inwards and two bevils outwards on the same side of the block; and that if the plaintiff was correct in contending that one of his blocks cut in two would be the same as two of the defendants' blocks, it would be equally true, that one of Mr. M'Carthy's blocks cut in two would be the same as two of the blocks of the plaintiff; and that if the plaintiff's block were not to be considered as in effect the same as Mr. M'Carthy's, the defendants' could not be considered the same as the plaintiff's.

An examined copy of Mr. M'Carthy's specification was put in; and it was proved by Mr. Farey, that in principle the invention there described was the same as the plaintiff's.

#### Pollock, A.-G.:

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There is no doubt, that if you take M'Carthy's block and divide it, you get a bevil inwards and outwards on the same side of the block.

MACNAMABA LORD ABINGER, C. B.:

HULSE.

You can make the plaintiff's block by cutting M'Carthy's block into two, and you can make the defendants' block by cutting M'Carthy's block into four, and there is an end of the originality. I think so, and probably the jury think so too.

The foreman of the special jury: "We do, my Lord."

Kelly:

The jury ought to be discharged as to the other issues.

Pollock, A.-G.:

If the jury are satisfied in favour of the defendants as to one issue which goes to the whole case, I think that I ought not to keep up the cause merely to determine the other issues.

Verdict for the defendants on the second issue, and the jury discharged as to all the other issues.

LORD ABINGER, C. B.:

I may now say that my opinion was against the plaintiff as to the angle not being stated, and that the specification in that respect was insufficient.

Pollock, A.-G., Cockburn, Murphy, Serjt., and Webster, for the plaintiff.

Kelly, Hoggins, and Warren, for the defendants.

1842. *March* 1.

ELGAR v. WATSON.

(Car. & M. 494-496.)

Winchester
Assizes.
[494]

Where a tenancy is continued beyond the time for which it was originally taken, and nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former; but the jury may give the landlord a larger sum for the continued occupation, if there be circumstances to show that such increased rent was expected by him in the event of holding over, and that that understanding was not repudiated by the tenant.

Assumpsir for use and occupation and for money lent. Particulars: For rent for two months, at 8s. a-week, and then, during the four months subsequent, at 14s. a-week, and also for 7l. lent to

defendant's servant. Pleas, nunquam indebitatus, and payment of 17l. in satisfaction.

ELGAR r. Watson.

The plaintiff let lodgings at a watering place in the Isle of Wight. The defendant went (18th May, 1841) to engage the apartments for his child and servant. The plaintiff said the charge would be 8s. a-week for two months, for two rooms. The defendant said, if the place agreed with the child's health, he should continue the lodgings on after the two months. plaintiff then said. "there must be a new arrangement at the end of the two months if the defendant continued to keep the apartments, because he (the plaintiff) could let them at the end of that period, and get more money for them in consequence of the 'season' commencing." The defendant said, money was no object. The child and servant remained till the 9th November following \*(six months), and, after the first two months, the plaintiff charged 14s. a-week for the lodgings. Nothing more had been said of raising the rent than what has been mentioned, though the defendant had been at the house twice, with other members of his family, for a day or two. Beside the above demand the servant of the defendant had, while living in the house, borrowed 71. from the plaintiff.

[ \*495 ]

### Coleridge, J. (in summing up):

There are different considerations attaching to either portion of the money claimed in this action. First, the plaintiff says, that he admits some contract, but that not more than 171. is due. substance of the contract was, I suppose, that the defendant did not know whether the place would suit, but he took it for two months certain; and then the plaintiff said, "If you stay longer there must be a new arrangement." It was impossible that the jury could doubt that the new arrangement meant an arrangement respecting money. But then, at the end of the two months, nothing was said as to an alteration in the charge. And it was assumed, on behalf of the defendant, that as nothing was said the price was to go on as before. There is no rule of law to that effect. The law, in these cases, exists only by the construction of the contract; generally speaking, in the absence of any new contract, the old continues; but if here, the facts and previous circumstances exclude the former agreement from attaching to the subsequent holding, I think the terms of a new tenancy remain open, and then, no new arrangement having been made, it is for the jury to ELGAR v. Watson.

[ \*496 ]

say what was a fair sum to be paid under that new holding. For the second point, namely, the 7l. borrowed by the servant; it had been said by the defendant's counsel that a servant has no right to borrow money which shall be charged to her master, especially as the money had not been proved to have been laid out for the defendant's child; yet the defendant had paid a sum into Court on the \*whole declaration, and therefore he acknowledged the plaintiff's right to claim on every item.

Verdict for the plaintiff for the whole amount.

Crowder and Poulden, for the plaintiff.

Cockburn and Ball, for the defendant.

1842.

Winchester
Assizes.

[ 622 ]

#### REG. v. OSBORNE.

(Car. & M. 622-624.)

In a case of rape, a person to whom the prosecutrix made a complaint very recently after the offence, as she was on her way home, may be asked whether she named "a person" as having committed the offence, but not whose name she mentioned.

[A SUFFICIENT account of this case may be found in the judgment of the Court for Crown Cases Reserved in R. v. Lillyman [1896] 2 Q. B. 167, 175, 65 L. J. M. C. 195, where the ruling that the statement of the prosecutrix did not form part of the res gestæ was approved, but the Court inclined to think "that the complaint in all its detail was nevertheless a fact admissible for the purpose of showing consistency of conduct on the part of the woman."—F. P.]

1842. Aug. 8.

## AUSTIN v. CROOME AND ANOTHER.

(Car. & M. 653-655.)

Gloucester Assizes.

The person who is entitled to the inheritance has a right to the possession of the title-deeds; and it is no answer to an action founded on his right to the possession of the deeds to show that another person has a term of 1,000 years vested in him to attend the inheritance.

Assumpsit for money had and received, with a count upon an account stated. Plea, except as to the 5l., non assumpserunt, and as to that sum payment of it into Court.

It was opened by R. V. Richards, for the plaintiff, that, in the year 1828, Mr. James Croome, who was not one of the defendants,

had agreed to purchase a farm called the Saddlebags; but before his purchase was completed it was arranged that Mr. Edward Austin should buy it, giving Mr. James Croome 50l. for his purchase, which he did, and by a subsequent arrangement the property was conveyed by Mr. Edward Austin and Mr. James Croome to the plaintiff, Mr. William Austin, in fee. The defendants, Messrs. Croome, who were solicitors, had had the deeds of this property in their hands, and would not give them up unless a sum of 42l. Os. 9d. was paid to them, \*they claiming a lien on the deeds to that amount. This sum was paid by the plaintiff, and the deeds were given up to him; and the present action was brought for 37l. Os. 9d. (the balance beyond the 5l. paid into Court), on the ground that whatever claims the defendants had on other persons, they had no lien on these deeds as against the plaintiff.

AUSTIN t. Croome.

[ \*654 ]

On the part of the plaintiff, an indenture of release, dated the 17th of May, 1842, was put in. It was between Edward Austin of the first part, James Croome of the second part, William Austin (the plaintiff) of the third part, and Anthony Austin of the fourth part. By this release the Saddlebags farm was conveyed to the plaintiff in fee; but the residue of an outstanding term of 1,000 years was assigned to Anthony Austin to attend and protect the inheritance.

## Talfourd, Serjt.:

I submit that the present plaintiff cannot maintain this action, as he has not the legal estate. For the remainder of this term of 1,000 years, the legal estate is in Mr. Anthony Austin and his representatives.

### TINDAL, Ch. J.:

The charters and muniments of the estate go with the person who has the inheritance; and I cannot put a person who has a term of 1,000 years in a different situation from one who has a seven years' lease, or is a tenant from year to year.

Verdict for the plaintiff.

## R. V. Richards and F. V. Lee, for the plaintiff.

Talfourd, Serjt., Greaves, and G. Jones, for the defendants.

In the ensuing Term, Greaves applied to the Court of Exchequer for a new trial, on the point above reported, \*when the Court refused a rule; but, upon other grounds the Court granted a rule, which was, after argument, discharged.

[ \*655 ]

1844. Jan. 20.

#### MAGISTRATES' CASES.

# REG. v. THE INHABITANTS OF WHITWICK.

(14 L. J. M. C. 25.)

Examination of pauper—Statement of subsequent settlement in third parish.

Where an order of removal is made from parish A. to parish B., upon examinations which show evidence of a settlement in the latter parish, the Sessions cannot refuse to go into that evidence, on the ground that the examinations disclose a subsequent settlement in parish C.

Upon an appeal against an order of two justices, for the removal of Samuel Goacher, his wife, and children, from the parish of Whitwick, in the county of Leicester, to the parish of Shineton, in the county of Salop, the Sessions quashed the order, subject to the opinion of the Court, upon a case which set out the following, amongst other examinations.

Samuel Goacher, the pauper, (after stating a hiring at a colliery, in Coleorton, when he was ten years of age,) said, "I am forty-two years of age; about fifteen years ago I was in distress, and applied to Coleorton parish for relief, and the parish officers of Coleorton relieved me; but I have never been relieved by the parish of Coleorton, whilst residing out of the parish except about eight years ago, when I was living in Whitwick parish, my wife was suffering from a miscarriage, and I applied to Mr. T. Ager, the parish officer of Coleorton, for assistance. He gave me a paper to go to a doctor, who thereupon attended my wife; but I received no money, or anything else but the doctor's free attendance upon my wife."

Mary Wardle, widow, said, "I am the mother of Samuel Goacher, the pauper. I married my first husband, John Goacher, the father of the pauper, at Coleorton Church. About forty-three years ago the pauper was born at Coleorton. My first husband was legally settled in Shineton. When he lay ill, about twenty-six years ago, I received relief from Shineton parish, whilst we were living at Coleorton. I received 2s. 6d. weekly, but that not being enough for our support I went to Shineton, and saw a person who said he was the parish officer. I asked him to give us more than 2s. 6d.; he refused to do so, but gave me 5s. to carry me home. I received this relief afterwards for a long time. My son, the pauper, was then a member of my family, and was not emancipated. He was about sixteen years of age."

The grounds of appeal (amongst others) were, secondly, that

upon the facts stated in the examination of Samuel Goacher, the settlement of the paupers appears to be in Coleorton; thirdly, that THE INHABIas stated in the examination, the parish officers of Coleorton admitted the paupers to be settled in their parish, by employing a medical practitioner to attend the said Samuel Goacher's wife. during her illness, whilst she was residing in the parish of Whitwick.

REG.

On the hearing of the appeal, the counsel for the respondents proposed to call Mary Wardle, to prove the settlement of the paupers in Shineton.

The counsel for the appellants contended, that such evidence could not be received, on the ground, first, that the examination disclosed no settlement in Shineton; and that if such settlement were disclosed, still on the face of the examination a subsequent settlement appeared to have been gained by Samuel Goacher at Coleorton by service, and also by relief given to his wife, whilst residing in the parish of Whitwick.

The Court of Quarter Sessions rejected the evidence, on the ground that a subsequent settlement in Coleorton by relief was disclosed on the examinations, subject to the opinion of the Court as to whether they were right in quashing the order of removal on the above ground.

Macaulay, in support of the order of Sessions:

Here the examinations distinctly disclose a settlement in the third parish. The question is, whether, supposing all the facts proved, the pauper was rightly removed to Shineton.

Hildyard and White, contrà, were not heard.

### LORD DENMAN, Ch. J.:

I think the Sessions were clearly wrong in this case. There was evidence of a settlement in the appellant parish, and they should have proceeded to hear it.

Order of Sessions quashed.

1845. *May* 28.

[ 126 ]

## REG. v. THE INHABITANTS OF MANCHESTER.

(14 L. J. M. C. 126.)

Examination of pauper—Evidence of chargeability.

A statement that the pauper is residing in the workhouse in P., and is chargeable to the township of P., is sufficient evidence of chargeability.

On appeal against an order of justices, for the removal of Anna Mollineux, from the township of Preston, in the borough of Preston, to the township of Manchester, the Sessions confirmed the order, subject to a case.

The only question raised was, as to the sufficiency of the statement of the chargeability of the pauper, who, in her examination stated, "I have lived in the township of Preston for some time past, and am now residing in the workhouse in that town. I have been and am now chargeable to the said township of Preston." If the Court should be of opinion that the examination contained no legal evidence that the pauper was actually chargeable to the respondent township, the order of Sessions to be quashed, otherwise to be confirmed.

Cowling, in support of the order of Sessions:

Chargeability is sufficiently stated. Reg. v. The Inhabitants of High Bickington (1) may be cited, but there it was merely said, that the pauper was chargeable.

(WILLIAMS, J.: That was a conclusion, not a fact. Here the fact also is stated.)

Crompton, contrà:

The statement of chargeability is insufficient.

(Williams, J.: How could she be in the workhouse without being chargeable? Here you have both a general and a particular statement of chargeability.)

It does not appear to be the workhouse of the township—she might be there as the matron or servant. The evidence of chargeability ought to appear on the face of the examination.

LORD DENMAN, Ch. J.:

So it does.

Patteson, J. and Williams, J. concurred.

(1) 3 Q. B. 790; 13 L. J. M. C. 74.

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#### COLERIDGE, J.:

REG. TANTS OF MAN-CHESTER.

You are contending that there must be conclusive evidence of THE INHABIchargeability in the examination. That is not so. Here there is some evidence of it, which is sufficient.

Order of Sessions confirmed.

### REG. v. T. PAYNTER, Esq.

1845. June 12.

(14 L. J. M. C. 182; S. C. 9 Jur. 926.)

[ 182 ]

Mandamus-Return-Demurrer.

After a demurrer to a return made to a mandamus by the party to whom it is directed, the Court will let in the party really interested to make a return.

A writ of mandamus issued to Mr. Paynter, in pursuance of the decision in the preceding case (1), on the 15th of May, to which, on the 28rd of May, Mr. Paynter made a return. To this return the prosecutors demurred. A rule nisi was subsequently obtained on the part of Chasemore calling on the prosecutors to show cause why he should not be permitted to frame an additional return to the mandamus.

Crompton and Pashley (June 12) showed cause:

The application is too late. Chasemore appeared by counsel to show cause against the issuing of the writ, and, if he desired to make the return, should have applied to do so at the time the rule for the mandamus was made absolute; or at least he should have made the application before the return was demurred to. By the stat. 1 Will. IV. c. 21, s. 4 (2), the Court is empowered to grant relief, and make rules as to third parties against whom a writ of mandamus is not directly issued, as they may to parties, under the Interpleader Act. An application under the Interpleader Act must be made before plea. No grounds are stated for the application, nor is there any affidavit negativing collusion with the magistrate, for the purpose of delay.

Montagu Chambers, contrà, was not heard.

### LORD DENMAN, Ch. J.:

I cannot see that the prosecutor can lose anything by consenting to this application. If we saw that any unfair advantage was

(1) R. v. Paynter, also reported 7 (2) Rep. S. L. R. Act, 1891; see Q. B. 255. now C. O. R. r. 73.

RKG. C. PAYNTER. given to Chasemore, who is the substantial defendant in the case, even if the prosecutors lost any time by allowing him to join in the return, or if there was any reason to apprehend any frivolous objection was to be raised, I should be disposed not to accede to this application. We should look narrowly at these cases, to see that prosecutors are not damnified by our allowing parties to come in and frame the return to the mandamus. As I do not see this in the present case, I think the application should be granted.

#### PATTESON, J.:

The application is for an additional return. The Act of 1 Will. IV. c. 21, gives us no power to allow that. It is true that it could not very well have been asked that the applicant should frame the return, the return having already been made. The return must be framed, stating the facts, and incorporating the magistrate's return.

WILLIAMS, J. concurred.

#### Coleridge, J.:

The demurrer need not be done away with. The prosecutor can still demur to the return of the magistrate.

Rule absolute accordingly.

1845. May 28.

### REG. v. THE INHABITANTS OF CUDDINGTON.

(14 L. J. M. C. 182-184; S. C. 2 New Sess. Cas. 10.)

[ 182 ]

Settlement by estate—Payment of acknowledgment to lord of manor.

A., in 1769, inclosed a piece of land from the waste, and built a cottage thereon, in which he resided sixty years. During the whole time a yearly rent of 2s. 6d. was paid by A. to the lord of the manor for the cottage; and on a further inclosure of land for a garden, the rent was increased to 3s.: Held, that A. gained no settlement thereby.

On an appeal against an order of two justices of the county of Chester, whereby the township of Cuddington was adjudged to be the last legal settlement of William Tomlinson, a pauper lunatic, and the overseers of that township were ordered to pay certain sums of money for his removal to the county lunatic asylum, and for his maintenance therein, the Sessions confirmed the order, subject to the opinion of the Court on the following case:

[ 183 ] The grandfather of the pauper, some time previous to the year

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1769, had inclosed a piece of ground from the waste lands in the township of Cuddington, belonging to the lord of the manor, and THE INHABIhad built a cottage thereon, in which he continued to reside till his death, in the year 1828 or 1829. It appeared by the production of receipts, which were proved by the mother of the pauper to have been found amongst her husband's father's papers at his death, that for some time a yearly rent of 2s. 6d. was paid to the lord of the manor, William Drake, Esq., which, on a further inclosure of land for a garden, had been increased to 3s., sixpence being added for the garden. One of the earlier receipts so produced was as follows:

REG. TANTS OF CUDDING-TON

"September 26, 1769. Received of James Tomlinson the sum of 2s. 6d., being a year's cottage rent due to William Drake, Esq. at Lady Day next.

"THOMAS ROYLANCE."

It was also proved by the mother of the pauper that her husband was the only son and heir-at-law of the grandfather, after whose death, about the year 1829, she and her husband's family went to live in the said cottage, and resided there for thirteen years; that her husband was working in another township, and came over to the cottage every Saturday, and remained there till the Monday morning; and so continued to reside, from the Saturday to the Monday, for several years, down to the time of his death. During the whole of this time the yearly rent of 3s. was always paid to the lord of the manor; she had latterly paid it herself to the agent, and during the last year the agent had spoken of raising the rent. Upon this evidence the respondents contended that the pauper had a derivative settlement in the appellant township, neither he nor his father having gained any settlement in their own right.

The question for the opinion of the Court was, whether, under the circumstances stated, the Sessions were right in deciding that the pauper was settled in the appellant township. If this Court should be of opinion that he was so settled, then the order of Sessions was to be confirmed. If not, the order of Sessions was to be quashed.

Townsend, in support of the order of Sessions:

The Sessions drew the proper inference from the evidence. Payment of an unvaried rent for a long series of years to the lord of a manor is evidence of a title in him to the rent only, and not REG.
r.
THE INHABITANTS OF
CUDDINGTON.

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to the land, for the presumption is that the rent is a quit-rent: Doe d. Whittick v. Johnson (1). The present case is still stronger than Doe d. Whittick v. Johnson, for here the payment has been for nearly seventy years.

(Patteson, J.: The authority of that case has been shaken, if not overruled. Besides, here the origin of the payment of the rent is shown: it was a compensation to the lord for the inclosure from the waste.)

The Court will be slow to remove a pauper, after a possession of more than twenty years: Rex v. Bitton (2). In Rex v. Garway (3), although a pauper had paid an acknowledgment of 2s. 6d. to the lord of the manor for thirty years, in respect of a cottage erected on the waste by his father, he was held to have gained a settlement thereby.

(Patteson, J.: What state of things do you suppose the Court below to have presumed?)

A licence from the lord may be presumed.

(Patteson, J.: But in Rex v. Horndon on the Hill (4), it was held that the grant of a licence from the lord to erect a cottage and inclose a piece of ground, rendering an annual rent, did not confer a settlement on the grantee, though he built the cottage and resided therein more than a year. Is the Court to presume a grant by deed, reserving a rent-charge? Can any instance be found of the creation of a quit-rent?)

Whateley and Egerton, contrà :

The payment in this case was not a quit-rent, but an acknow-ledgment of the lord's title; the sum paid was increased when the garden was added. But even if it was a quit-rent, no settlement was acquired, for in the absence of a custom for that purpose the lord cannot make a new grant of copyhold: Rex\*v. Hornchurch (5). In Rex v. Bitton, there had been adverse possession without any payment whatever, for more than twenty years. And in Rex v. Garway, the pauper's father had been in possession for thirty years

<sup>(1) 21</sup> R. R. 826 (Gow, N. P. C.

<sup>173).</sup> 

<sup>(2)</sup> Burr. S. C. 631.

<sup>(3)</sup> *1bid*. 632. (4) 4 M. & S. 562.

<sup>(5) 2</sup> B. & Ald. 189.

without any payment of rent. The pauper in that case, therefore, had a good settlement by descent, though he afterwards by some THE INHABImistake paid an acknowledgment for the premises. (They were then stopped.)

REG. CUDDING-TON.

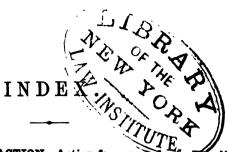
#### LORD DENMAN, Ch. J.:

The Sessions here had no materials on which to found the decision to which they came. The origin of these payments was proved, and they were clearly an acknowledgment of the lord's title during the whole time the grandfather was in possession. was, therefore, no adverse possession, as there was in the case of Rex v. Garway.

The rest of the Court concurred.

Order quashed.





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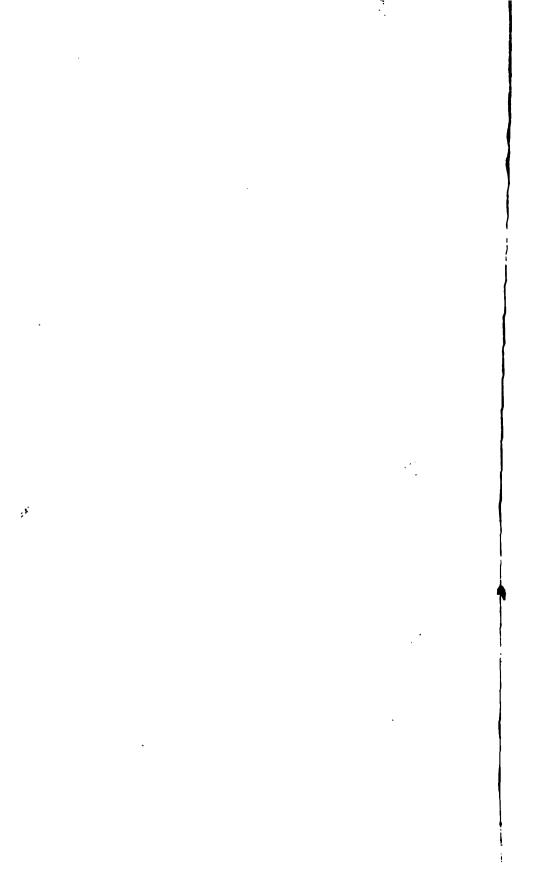
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